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Supreme Court of the United States

OCTOBER TERM, 1969

No. 27

DAVID BERNARD BARASH,
Petitioner,

vs.

UNITED STATES OF AMERICA.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	
1. A person may not be convicted of violating a statute, here 26 U.S.C. §7214(a)(2), which does not forbid his activities	16
2. It was error to submit to the jury the counts under 18 U.S.C. §201 as well as the counts under 26 U.S.C. §7214(a)(2)	24
(a) A majority of the panel below thought Milanovich should apply	26
3. It was error for the Court to exclude the defense of economic coercion from the counts under 26 U.S.C. §7214(a)(2) and 18 U.S.C. §201(f)	30
(a) The Court below presumed that the jury considered the defense excluded by the trial court	36
4. Allowing a conviction of an alleged offense induced by an undercover agent on evidence manufactured by him brings our system of criminal justice into disrepute	39

PAGE

5. A coerced verdict vitiates the right to trial by jury 41

(a) The erroneous compulsion of successive verdicts 44

(b) Imputing guilt to petitioner from the pleas of co-defendants 46

6. An indictment is invalid which has been returned by a grand jury which has not heard the evidence allegedly in support of it 48

7. Petitioner did not receive a fair trial 49

CONCLUSION 49

APPENDIX 1a

Index to Appendix

Opinion of the Court of Appeals 1a

Opinion of the District Court 25a

Opinion of the Court of Appeals on the First Trial 32a

Judgment of the District Court 46a

Judgment of the Court of Appeals 49a

Court of Appeals Order Denying Hearing En Banc 51a

Court of Appeals Order Denying Rehearing, Granting Stay 52a

Constitutional and Other Provisions 54a

Constitution

Amendment V 54a

Amendment VI 54a

PAGE

Statutes

18 U.S.C.

§ 2 ..... 55a

§ 201 (former) 55a

§ 201(a) 56a

§ 201(b) 57a

§ 201(c) 57a

§ 201(f) 58a

§ 201(g) 58a

26 U.S.C.

§ 7214(a)(2) 58a

Federal Rules of Criminal Procedure

Rule 31 ..... 59a

Tabulation of Resolution of Counts at Second Trial 61a

Cases Cited

Allen v. United States, 164 U.S. 492 (1896) 41

Bain, Ex parte, 121 U.S. 1, 7 S.Ct. 781 (1887) 49

Bennett v. United States, 89 F.2d 52 (5th Cir. 1937) ..44, 45

Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697 (1964) 19, 20

Boyd v. United States, 271 U.S. 104, 46 S.Ct. 442 (1926) 47

Bruno v. United States, 308 U.S. 297, 60 S.Ct. 198 (1939) 38

PAGE

Bucklin v. United States, 159 U.S. 680, 16 S.Ct. 182 (1895) 43

Chadwick v. United States, 117 F.2d 902 (5th Cir. 1941) 44, 45

Coffin v. United States, 162 U.S. 664, 16 S.Ct. 943 (1896) 20

Dealy v. United States, 152 U.S. 539, 14 S.Ct. 680 (1894) 44, 45

Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294 (1957) 38

Gebardi v. United States, 287 U.S. 112, 53 S.Ct. 35 (1932) 20

Green v. United States, 355 U.S. 184, 78 S.Ct. 221 (1957) 44, 45

Green v. United States, 309 F.2d 852 (5th Cir. 1962) 41, 42

Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963 (1957) 17

Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451 (1959) 24

Henderson v. United States, 237 F.2d 169 (5th Cir. 1956) 40

Hornstein v. Paramount Pictures, 37 N.Y.S.2d 404 (Sp. T. N.Y.Co. 1942) 35, 36

Jenkins v. United States, 380 U.S. 445, 85 S.Ct. 1059 (1965) 42

Jolly v. United States, 170 U.S. 402, 18 S.Ct. 624 (1898) 44, 45

PAGE

Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045 (1966) 41

Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381 (1963) 47

May v. United States, 175 F.2d 994 (D.C.Cir. 1949) 23

Milanovich v. United States, 365 U. S. 551 (1961) 3, 9, 24-28

Rice v. United States, 356 F.2d 709 (8th Cir. 1966) 42

Sansone v. United States, 380 U.S. 343, 85 S.Ct. 1004 (1965) 29

Sears v. United States, 343 F.2d 139 (5th Cir. 1965) 40

Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210 (1932) 39, 40

State v. Begyn, 34 N.J. 35, 167 A.2d 161 ..... 20, 21

State v. Teahan, 50 Conn. 92 20

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960) 49

Tomoya Kawakita v. United States, 343 U.S. 717, 72 S.Ct. 950 (1952) 34, 35

Umans v. United States, 389 U.S. 80, 88 S.Ct. 253 (1967) 48

Union Pac.R.Co. v. Public Service Commission of Missouri, 248 U.S. 67, 39 S.Ct. 24 (1918) 35

United States v. Alpers, 338 U.S. 680, 70 S.Ct. 352 (1950) 19, 24

United States v. Barash, 365 F.2d 395 (1966) 1, 11-14, 22, 26-28, 30, 31, 34

PAGE

United States v. Barash, 266 F.Supp. 126 (S.D.N.Y. 1966) 2

United States v. Byrd, 352 F.2d 570 (2d Cir. 1965) 32

United States v. Cohen, 387 F.2d 803 (2d Cir. 1967) 17, 26

United States v. Dietrich, 126 Fed. 664 (D.Neb. 1904) 20

United States ex rel. Rosado v. Flood, 394 F.2d 139 (2d Cir. 1968) 32

United States v. Fromen, 265 F.2d 702 (2d Cir. 1959) 23

United States v. Gerdel, 103 F.Supp. 635 (E.D.Mo. 1952) 21

United States v. Irwin, 354 F.2d 192 (2d Cir. 1965) 28, 31

United States v. James, 290 F.2d 866 (5th Cir. 1961) 48, 49

United States v. Kenner, 354 F.2d 780 (2d Cir. 1965) 9, 17, 22-24, 26-29

United States v. Resnick, 299 U.S. 207, 57 S.Ct. 126 (1936) 19

United States v. Rogers, 289 F.2d 433 (4th Cir. 1961) 42

United States v. Smith, 353 F.2d 166 (4th Cir. 1965) 42

United States v. Umans, 368 F.2d 725 (2d Cir. 1966) 26, 28, 29, 32

PAGE

Statutes Cited

18 U.S.C.:

Sec. 2 ..... 2-4, 6, 11, 16, 20, 22, 24, 28, 45

Sec. 566 45

Sec. 201 ..... 2-4, 6-8, 10, 15, 18, 23-29, 31

Sec. 201(b) 4, 6, 7, 9, 17, 23, 25, 28-30

Sec. 201(f) 3, 4, 6, 7, 9, 11, 15, 18, 19, 23, 25, 28-33, 36, 39, 40

Sec. 201(g) 4

Sec. 202 6

Sec. 212 18

Sec. 650 23

26 U.S.C.:

Sec. 4047(e)(2) (I.R.C. 1939) 20, 21

Sec. 7213 ..... 17, 20

Sec. 7214(a) 2-4, 6, 7, 10, 11, 15-18, 20-22, 24-33, 36, 39, 41, 44

28 U.S.C.:

Sec. 1254(1) 2

Rule Cited

Federal Rules of Criminal Procedure:

Rule 31 ..... 4, 45

Other Authorities Cited

Judiciary Law of the State of New York:

Sec. 90 10

PAGE

New York Penal Law:

Sec. 200.30 18

Sec. 200.35 18

Sec. 855 18

Sec. 1826 18

Sec. 1831 18

Practice Commentary to New York Penal Law:

Sec. 200.35 18

Senate Report 1020 (1951, 82d Cong. 1st Sess.), 1951 U.S.Code Cong. & Admin.Serv. 2578 23

Supreme Court of the United States

OCTOBER TERM, 1969

Docket No.

DAVID B. BARASH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner David B. Barash prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 9, 1969.

Opinion Below

The opinion of the Court of Appeals, reprinted in the Appendix bound with this petition, is not yet officially reported. The opinion of the Court of Appeals reversing petitioner's first conviction is reported at 365 F. 2d 395. An opinion of the United States District Court for the

Southern District of New York, on remand after the first appeal, denying a motion to dismiss the counts on which petitioner was subsequently convicted, and in the alternative to compel an election between those counts and other counts and for a severance, is reported at 266 F. Supp. 126. A copy of each of these opinions is appended to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on April 9, 1969. A timely petition for rehearing and a hearing *en banc* was denied May 23, 1969. The Court of Appeals on the same date granted a stay of the mandate pending a petition to this Court for a writ of certiorari. Jurisdiction in this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does 26 U.S.C. §7214(a)(2), which on its face applies only to an officer or employee of the United States who demands or receives a fee, compensation, reward, not prescribed by law, apply to the person on whom such demand is made or from whom such payment is received, who is not an officer or employee but whose participation is necessary in any such offense committed by an officer or employee?

2. Is it permissible for an indictment to charge in duplicate series of counts that the identical alleged payment from an accountant to an Internal Revenue Service auditor violated 18 U.S.C. §201 as well as 26 U.S.C. §7214(a)-(2) via 18 U.S.C. §2?

   (a) If so, should both such series of counts be submitted to the jury?

(b) If both such series be submitted to the jury, is an instruction required that the jury may convict on any single transaction under only one count charging a violation of either statute but not both?

3. Are threats of harm, which are sufficient to constitute economic coercion by Internal Revenue auditors on the accountant petitioner who allegedly made payments to them, a defense to the element of willfulness required to convict under 26 U.S.C. §7214(a)(2) via 18 U.S.C. §2 and 18 U.S.C. §201(f)?

4. May a United States Court of Appeals in reviewing a criminal case presume that the jury considered and rejected a defense to the charges on which conviction was had where the trial court expressly instructed the jury that it could not consider the defense on those charges?

5. May a conviction be affirmed by a three judge panel of a Court of Appeals when two of the judges are of the opinion:

(a) that the defendant could not violate the statute, 26 U.S.C. §7214(a)(2), under which he was convicted; and

(b) that the duplication of identical transactions in multiple counts of the indictment under 18 U.S.C. §7214(a)(2) via 18 U.S.C. §2 and 18 U.S.C. §201 as presented to the jury violated the principle of *Milanovich* v. *United States*, 365 U. S. 551 (1961)?

6. Is a defendant entitled to a charge of entrapment when he offered proof that an Internal Revenue Inspector acting as an undercover agent by posing as an office auditor manufactured evidence to show at trial that a fraudulent audit had been conducted and money paid to that end?

7. Are a defendant's rights to due process and trial by jury violated by

(a) the giving of an *"Allen"* charge before the jury announced any disagreement;

(b) the taking of a verdict on the second day of deliberation on counts charging lesser offenses and then compelling the jury to deliberate anew on counts covering exactly the same transactions but which charged more serious offenses with greater penalties?

8. Was petitioner denied due process when testimony of ex-auditors of the Internal Revenue Service that they had pleaded guilty to charges of receiving unlawful payments from him was permitted by the trial court, yet the trial court failed to instruct the jury that such pleas of guilty could not be considered as evidence of petitioner's guilt?

9. Was petitioner's right not to answer to an indictment on the felonies charged unless returned by a grand jury violated by the prosecutor's choice to have the witnesses against him testify before a grand jury other than the one which returned the indictment against him?

10. Was petitioner denied a fair trial?

Constitutional and Statutory Provisions Involved

The Constitutional and statutory provisions involved, U. S. Const., Amendments V and VI, 18 U.S.C. §§2, 201, 201(b), 201(f), 201(g), 26 U.S.C. §7214(a)(2), as well as Rule 31 of the Federal Rules of Criminal Procedure, are reproduced in the appendix to this petition.

Statement of the Case

This case presents to the Court a record replete with errors from the return of the indictment through appellate review. The error, of basic and general application, involves conflicts with other Circuits and prior decisions of this Court. To grant *certiorari* in this case would not only be the granting of substantial and procedural justice to the individual petitioner, always important, but would most economically provide this Court with the opportunity to resolve several problems which promise to recur throughout the Federal administration of criminal justice.

The Indictment

The indictment filed against petitioner originally contained 35 counts, 32 of which named him as a defendant (A. 12a-17a).* The 32 counts actually consisted of two paired sets of counts, each pair involving a single alleged payment by petitioner to an office auditor for a single Internal Revenue audit of a particular taxpayer's return for a particular year.** The additional three counts (33-35) were placed in the indictment for a specific purpose and charged only ex-office auditors of Internal Revenue Service with a violation of 18 U.S.C. §201(g). The purpose

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* Citations marked "A. —a" are to the pagination in the appendix on appeal, a certified copy of which has been filed with this petition. Citations in the form "R. —" are to the original record on appeal which has been certified by the Clerk's office of the Court of Appeals and mailed directly to this Court.

** At the first trial, petitioner was acquitted of three such transactions for a total of six counts, involving two ex-auditors of the Internal Revenue Service. Thus, at the second trial, from which this petition evolves, there was a total of 26 counts, based on thirteen transactions with three ex-auditors.

of these counts was to allow the ex-office auditor concerned to plead guilty to the lesser offense under that statute instead of pleading guilty under the offense with the greater penalty, 18 U.S.C. §201(c), just as they were allowed to plead guilty to the lesser offense under 26 U.S.C. §7214(a)(2) rather than the more serious felony of accepting a bribe under former 18 U.S.C. §202 concerning audits before the 1963 revision of 18 U.S.C. §201. All of the ex-auditors of the Internal Revenue Service so pleading testified against petitioner and others, and received suspended sentences for so doing, as was their hope by testifying (A. 327a, 448a). They were not even named as defendants in the bribery counts although they testified at trial that they received bribes from petitioner.

A complete chart of the counts extant at the second trial and their disposition is contained in the appendix to this petition. In sum, they consisted of the following:

(a) Ten counts (1-6, 9, 11, 12, 14) charging petitioner with bribery of ex-auditor Clyne in connection with certain tax returns (former 18 U.S.C. §201 and present 18 U.S.C. §201(b)), and ten counts (18, 21-6, 29, 31-2) involving the same alleged payments to Clyne on the same alleged tax returns (26 U.S.C. §7214(a)(2) and 18 U.S.C. §2 matching the former 18 U.S.C. §201 counts; 18 U.S.C. §201(f) matching the present 18 U.S.C. §201(b) count) (A. 12a to 17a);

(b) Two counts (8 and 10) charging petitioner with bribery of ex-office auditor DeSibio (former 18 U.S.C. §201) and an additional two counts (28 and 30) involving the same alleged payments to DeSibio on the same alleged tax returns (26 U.S.C. §7214(a)(2) and 18 U.S.C. §2) (A. 13a, 16a);

(c) One count (16) charging petitioner with bribery of Coady, the undercover inspector posing as an office auditor (18 U.S.C. §201(b)) and an additional count (20) involving the same payment to Coady on the same alleged tax return (18 U.S.C. §201(f)) (A. 14a, 15a).

No use of 18 U.S.C. §2 to prosecute the alleged payor of compensation to an Internal Revenue employee under 26 U.S.C. §7214(a)(2) is recorded until *after* Congress enacted in 1963, 18 U.S.C. §201(f). This section prohibited a wilful payment to a Government employee in connection with his duties, as a lesser included offense under 18 U.S.C. §201(b), bribery of a Government employee. Prior to the 1963 revision to 18 U.S.C. §201, there was no statute which penalized the conduct now proscribed by 18 U.S.C. §201(f).

This indictment was returned by a grand jury which heard none of the evidence from the witnesses who testified against petitioner at his trial (A. 1071a-73a); that is, the grand jury merely acquiesced in the drafting of the duplicated multiple counts by the prosecution. This procedure was not merely an inadvertence or oversight by the prosecution. The ex-office auditors who testified against appellant had agreed to cooperate with the prosecution in any number of cases in exchange for favorable treatment long before the return of the indictment in the present case. In fact, according to the Government's brief on appeal to the court below, those witnesses did testify before several grand juries other than the one which indicted petitioner, but for no reason as yet advanced did not testify before the grand jury that voted the indictment against petitioner (Appellee's brief below, p. 38). The court below recites the interests of economy

(undemonstrated and irrelevant) (Slip sheet opinion, p. 1837). What resulted was a complete violation of petitioner's rights under the Fifth Amendment, two lengthy and costly trials and appeals on an indictment by a grand jury which not only did not hear the witnesses under the prosecution control but which rubber-stamped a multiplication of charges at the prosecution's request to the ultimate trial prejudice of the defendant.

The Erroneous Sanctions of the Multiple Counts

In his concurring opinion on the second appeal, Circuit Judge Friendly stated, Circuit Judge Feinberg concurring:

> "If the issue were *res nova,* I would have considerable difficulty in believing that an accountant who makes a payment to an internal revenue agent can properly be convicted for aiding and abetting the agent in violation of 26 U.S.C. §7214(a)(2). The ALI Model Penal Code, which uses the term 'accomplice' to encompass aiding and abetting, §2.06(3), said in §2.06(6):
>
> > 'Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
> >
> > (b) the offense is so defined that his conduct is inevitably incident to its commission;
> >
> > . . .'
>
> This principle would seem peculiarly applicable when the legislature has enacted other provisions, here 18 U.S.C. §201, specifically directed against the payor, even though Congress decided in 1963

that these were not broad enough." (Slip sheet, opinion, p. 1846)

Judges Friendly and Feinberg, however, felt foreclosed from reaching the decision they plainly believed to be right by a previous decision of the Second Circuit in *United States* v. *Kenner,* 354 F. 2d 780, 785 (2d Cir. 1965). That decision, as well as the upholding of petitioner's conviction as a non-agent payor under 26 U.S.C. §7214(a)(2), is contrary to the provisions of that statute, its history and purpose, decisions of this Court and Courts in other Circuits.

Circuit Judge Friendly, again with Circuit Judge Feinberg concurring, also stated below that:

> "I am also not entirely persuaded that even if Barash could permissibly be held guilty as an aider or abettor of the agent's violations of 26 U.S.C. §7214(a)(2), he could be convicted both of that and of a violation of §201, see *Milanovich* v. *United States,* 365 U.S. 551 (1961), as he was an counts 8 and 28, and 10 and 30, but that also seems to be assumed by our previous decisions." (Slip sheet opinion, p. 1847)

It is respectfully submitted that this carries *stare decisis* too far. Petitioner's rights to a fair trial under appropriate jury instructions should not be frustrated by "assumptions" in previous decisions of the Second Circuit which neither discussed nor decided the point, particularly when those "assumptions" are plainly contrary to this Court's holding in *Milanovich.* The prejudicial nature of this ruling is revealed by the instructions given in the trial court and the action the jury took thereon. The trial judge instructed the jury that it could not return a verdict of guilty on both of the paired courts under 18 U.S.C. §201(b) (Counts 14 and 16) and §201(f).

(Counts 18 and 20) (A. 1010a-11a). The jury returned a verdict only under the lesser offenses under Section 201 (f) on these pairs of counts and the trial court, correctly construing the jury's action as an implied verdict of acquittal on the greater offenses, dismissed Counts 14 and 16 (1124a-25a). However, the trial court refused to instruct the jury that it could not return a verdict of guilty against petitioner on the paired counts which charged the identical transaction as a violation of 18 U.S.C. §201 (Counts 1-6, 8-12) and 26 U.S.C. §7214(a)(2) (Counts 21-26, 28-32) (A. 611a). As a result, petitioner was convicted in the jury's first verdict on Counts 28 and 30 which charged him with aiding and abetting ex-auditor DeSibio in violation of 26 U.S.C. §7214(a)(2), and after the jury was compelled to redeliberate they found petitioner, on the identical transactions, guilty, in Counts 28 and 30, of bribing ex-auditor DeSibio in violation of 18 U.S.C. §201. The conviction on these latter two counts have particularly severe consequences to petitioner who was an attorney as well as a certified public accountant, because under Section 90 of the Judiciary Law of the State of New York a conviction under 18 U.S.C. §201 automatically revokes his license to practice, whereas under the convictions on all the other counts he would be entitled to a hearing before any disciplinary action was taken.

The Rejection of Defenses

In both trials petitioner offered the defense of economic coercion, contending that pressure put upon him by the ex-auditors who testified against him in the form of threats to himself and to his practice through unjust treatment to his clients unless he paid for only what he was entitled to, a proper audit of his clients' returns, demonstrated that any payments which the jury may have found were made without the requisite criminal intent.

On the first appeal the Second Circuit reversed petitioner's conviction on the same indictment because the first trial court had erroneously thwarted petitioner's attempts to develop it fully and had erroneously charged the jury that it was no defense. 365 F. 2d at 400-402. However, in that opinion the Court of Appeals held that while the defense of economic coercion did bear on the specific intent required for the commission of bribery, it inclined to the view that economic pressure was not relevant to the offenses charged under 18 U.S.C. §201(f) and aiding and abetting a violation of 26 U.S.C. §7214(a)(2). 365 F. 2d at 402. In the second trial the trial court charged the jury that it could consider pressure exerted by the auditors on petitioner as a defense under the bribery counts relating to auditor Clyne (10 counts), but not upon the ten additional counts involving the same alleged payments to the same auditor under 18 U.S.C. §201(f) and 26 U.S.C. §7214(a)(2) (A. 1018a). Again, the prejudice to petitioner is indicated by the jury's verdict. On the ten counts on which the jury was told that it could consider the defense of economic pressure, it either acquitted petitioner or returned no verdict (A. 1069a-70a). On the parallel ten counts on which it was told it could not consider that defense even though they involved the same alleged payments to the same ex-auditor on the same tax returns, the jury returned a verdict of guilty (A. 62a-63a, 1069a-70a).

It is undisputed that offenses charged against petitioner under 18 U.S.C. §2 and §201(f) do require proof of criminal intent. Significantly, on the second appeal which was heard by the same panel (Circuit Judges Moore, Friendly and Feinberg) that heard the first appeal, the Circuit court did not adopt as a holding the view to which it had "inclined" in the first appeal, that economic pressure was irrelevant to non-bribery payments to the auditors. It merely said that it could not criticize the trial judge for

following the Circuit court's previous opinion (Slip sheet opinion, p. 1831). Indeed, the Circuit court sidestepped the issue by holding that it would assume that the jury had considered and rejected the defense on the non-bribery counts even though the trial court expressly instructed the jury to ignore that defense. (Slip sheet opinion, pp. 1831-32).

As this error infects ten of the thirteen non-bribery payments of which appellant was convicted, it is serious enough to infect the jury's verdict on the remaining three counts as the Circuit court itself held on petitioner's first appeal. 365 F. 2d at 403.

The trial court refused petitioner's charge on the law of entrapment as applied to the facts of the alleged payment to the undercover agent Coady (Counts 16 and 20). Coady was an agent of the Inspection Division of the Internal Revenue Service who was posing as an ordinary office auditor in order to gather evidence of criminal violations by office auditors, and the taxpayers and taxpayers' representatives, with whom they dealt. The evidence of entrapment, largely brought out on cross examination of Coady himself, showed that Coady was made no offer or promise of payment in connection with the audit by petitioner (A. 538a-39a), that after the conduct of a fully professional audit of a taxpayer's return during which petitioner showed Coady full substantiation of the items to be questioned on the return, Coady had told petitioner that Coady was leaving the Internal Revenue Service to go into the Armed Services, complained that he was deeply in debt, and made petitioner feel that Coady was appealing to him to alleviate his financial plight before he went off to serve his country (A. 489a, 793a-795a, 940a). Thereafter, petitioner testified that he gave Coady an envelope containing $50.00 in response to Coady's pleas (A.

795a). In addition, prior to meeting petitioner, Coady had pretended to be a friend of auditor Clyne and plied him with whiskey, had been warned by Clyne that petitioner would not pay an auditor unless he was pressured to do so (A. 250a, 288a). It was also shown that after Coady had completed the audit with petitioner he falsified his report of the audit so blatantly that the audit was presented as having no relationship to the type of audit he had been requested to perform by his superiors (A. 516a, 528a, 535a, 544a-60a).

Assuming that petitioner had any burden of showing lack of propensity, he amply sustained it. As the Second Circuit held on the first appeal:

> "We are dealing here with an attorney and certified public accountant of hitherto unblemished reputation, vouched for, among others, by the Surrogate of Westchester County, a Justice of the Supreme Court of New York, and the County Executive of Westchester." 365 F. 2d at 403.

—a showing alone sufficient for the jury to conclude that petitioner would not have willingly made unlawful payments to Government employees. In addition, auditor Clyne had an animus against petitioner because he had demanded money from petitioner which petitioner refused to pay (A. 243a, 288a).* Unfortunately, the Circuit Court

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* On cross examination of Clyne by counsel for petitioner the following occurred:

> "Q. Did you ever try to get money from Mr. Barash which he refused to give you? A. [Clyne] Yes. (A. 243a)
>
> * * *
>
> Q. You also told Mr. Coady that with certain accountants you felt you never had to ask them for anything, they always voluntarily gave you the money after the audit; isn't that right? A. [Clyne] I said I didn't have to ask for it. That's correct.
>
> Q. But with Barash you could get robbed with Barash; is that what you said? A. That's correct." (A. 288a)

ignored the additional proof on the second trial and by sanctioning the trial court's refusal to instruct the jury that on this evidence they might conclude that undercover agent Coady had set out to create the appearance of crime, where crime there was not, erroneously reinforced for the jury the misleading appearance noted by the Second Circuit Court on the first appeal as "Coady, the single agent whose slate was clean and whose testimony may thus have carried particular weight." 365 F. 2d at 399.

The Charge to the Jury

The trial court failed to charge that the testimony of ex-auditors Clyne and DeSibio that they had pleaded guilty to receiving unlawful payments from petitioner (A. 46a, 379a) could not be considered as evidence of petitioner's guilt.

The Allen Charge and the Dual Submission of Petitioner to the Jury

The jury deliberated two days, Friday and Saturday. It was allowed to suspend its deliberations shortly before midnight on Friday night and was given an instruction at that point by the trial court that it must continue in its deliberations to reach a verdict on all counts.* When petitioner's counsel objected that a jury should not be instructed that it must reach a verdict, the trail court plainly stated that it intended to coerce a verdict:

> "The Court: They are under a compulsion, and if they hang up I will give them the Allen charge.

---

* "If during the morning you reach a point where you are agreed on a verdict as to any count or counts we can take the verdict on that count or counts if you will just let the Marshal know and you can *then continue the deliberation on the other counts.*" (A. 1039; emphasis added)

> They are under a compulsion. I do not believe in telling juries that it is within their province to disagree. I don't think so. I think they should return a verdict." (A. 977a)

On Saturday the jury returned a verdict of guilty on the counts charging petitioner as a payor with the aiding and abetting of the unlawful exaction of payments by ex-auditors Clyne and DeSibio (Counts 21-26, 28-32) and the trial court thereupon gave the jury a modified version of the *Allen* charge as to the necessity of reaching a verdict as to all the remaining counts (A. 1064a-66a). Thereafter, the jury returned a second partial verdict which included the only two bribery counts on which conviction was found (A. 1069a).

The Sentence

Petitioner was sentenced cumulatively on each count as to which a guilty verdict was returned. Petitioner's only term of imprisonment of nine months was imposed concurrently on Counts 21-32 which charged him with aiding and abetting a violation of 26 U.S.C. §7214(a)(2). He also received a cumulative fine of $1,000.00 on each of these counts. In addition, he received a sentence of two years imprisonment, execution suspended, of five years probation with a cumulative fine of $2,500.00 on each of the counts under 18 U.S.C. §201(f) (Counts 18 and 20) and a sentence of five years, execution suspended, five years probation and a cumulative fine of $2,500.00 on each of the counts (8 and 10) under 18 U.S.C. §201.

The Appeal

With petitioner's contention that he as the alleged payor could not aid and abet the auditors' unlawful receipt of funds from himself in violation of 26 U.S.C. §7214(a)

(2), 18 U.S.C. §2, two of the three judges agreed, yet the conviction was allowed to stand on these eleven counts.

The same two judges agreed that the case should not have been submitted to the jury on instructions that they could convict petitioner of bribery under 18 U.S.C. §201 on the identical payments as to which they returned a convictim of aiding and abetting the agents' unlawful receipt of the payment. That submission to the jury involved 22 of the 26 counts presented to the jury for decision. Yet, petitioner's conviction was allowed to stand on such a dual submission, which resulted in the only two verdicts of guilty on bribery charges of the 13 submitted to the jury, and that only on the second verdict.

The court below affirmed petitioner's convictions on all counts as to which a guilty verdict was returned and the cumulative sentences thereon, even though four of the convictions were returned after the trial court had compelled the jury to deliberate further after the return of its first verdict. Had the trial court excused the jury after its first verdict against the only defendant on trial, its silence as to most of the remaining counts, including the only two bribery counts on which a guilty verdict was later returned, would have resulted in an implied verdict of acquittal.

Reasons for Granting the Writ

1. A person may not be convicted of violating a statute, here 26 U.S.C. §7214(a) (2), which does not forbid his activities.

The majority of the counts on which petitioner was convicted*—eleven of fifteen—charged him with aiding and

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* As petitioner was convicted *only* of aiding and abetting Internal Revenue Service employees' violation of 26 U.S.C. §7214-(a)(2) on the first verdict, which petitioner contends was the only verdict properly received, see Reason 5, *infra*, a reversal of petitioner's conviction on these counts should work a dismissal of all charges against petitioner.

abetting two auditors of the Internal Revenue Service in their demand and acceptance of fees not prescribed by law *from petitioner* which demand and acceptance was a violation of 26 U.S.C. §7214(a)(2). Section 7214(a)(2), by its explicit terms, applies only to Government employees acting in connection with an Internal Revenue Law.

Since 1963, a large number of defendants, not employees of the Government, in addition to petitioner, have been convicted of similar charges. See, *e.g., United States* v. *Kenner,* 354 F. 2d 780, 785 (2d Cir. 1965), cert. den. 383 U.S. 958, 86 S. Ct. 1223 (1966); *United States* v. *Cohen,* 387 F. 2d 803, 804-06 (2d Cir. 1967), cert. den. 390 U.S. 996, 88 S. Ct. 1197 (1968). In addition, there are undoubtedly a number of indictments outstanding in the Southern District of New York and elsewhere which also charged the alleged maker of payments to Government agents with aiding and abetting the agents' violation of 26 U.S.C. §7214(a)(2), which indictments have been filed since 1963. Before 1963, prosecutions of payors as aiders and abettors are sparse, if not, indeed non-existent. Although Section 7214 (a)(2) and its predecessor sections have been in force since the Civil War, see Historical Note to 26 U.S.C. §7213, and has been used prior to 1963 to prosecute Government agents for receiving unauthorized payments, it was not used before 1963 to prosecute the non-agent payors. See, *e.g., Grunewald* v. *United States,* 353 U.S. 391, 396 n.7, 77 S. Ct. 963, 969 n.7 (1957).

What makes 1963 a watershed year for this misapplication of 26 U.S.C. §7214(a)(2) is as curious as it is illegitimate. In 1962 Congress revised the statutes dealing with bribery and conflicts of interest concerning Federal employees (present 18 U.S.C. §201, *et seq.*). In addition to proscribing corrupt payments to public officials made with intent to influence any official act (18 U.S.C.

§201(b)), Congress also forbade payments to public officials for the proper discharge of their duties (18 U.S.C. §201(f)). The effective date of the statute was ninety days after October 23, 1962, the date of enactment, *i.e.*, January 21, 1963. Pub. L. 87-849, §4, 76 Stat. 1119; see Historical Note following present 18 U.S.C.A. §201. Prior to the enactment of 18 U.S.C. §201(f), there was no Federal statute which specifically applied to the payor of an amount of money to a Federal employee acting in connection with an Internal Revenue law or otherwise, unless the payment constituted a traditional bribe (former 18 U.S.C. §201*).

Recently, New York State revised its statute governing payments to public servants, patterning the revision on the 1963 revision to the Federal statutes. See Practice Commentary to N. Y. Penal Law, §200.35. Prior to this revision the New York statute, like the Federal, had a general bribery provision and a section parallel to 26 U.S.C. §7214(a)(2) which applied only to receipt of unauthorized fees by a public servant, former N.Y. Penal Law §§855, 1826 and 1831. In 1955 New York enacted §200.30 of the Penal Law which is parallel to 18 U.S.C. §201(f). The commentator notes: "The former Penal Law, however, had no counterpart provision for the giver of an unlawful gratuity . . . Section 200.30 is intended to fill that gap." Practice Commentary to N. Y. Penal Law, §200.35. It is respectfully submitted that prior to the enactment of 18 U.S.C. §201(f), the Federal statutes had the same gap.

What the office of the United States Attorney for the Southern District of New York has done is to give ex-

* See also former 18 U.S.C. §212 which prohibited payments to influence customs officers.

post facto application to 18 U.S.C. §201(f) by charging a payor of money to an Internal Revenue agent, without intent to influence the agent's action, as aiding and abetting the agent's receipt of an unauthorized fee, *if* the payment occurred prior to the effective date of 18 U.S.C. §201(f). If exactly the same type of payment, without intent to influence the agent, was allegedly made by the same payor to the same agent under the same circumstances it is charged as a violation of 18 U.S.C. §201(f), if the payment occurred after the effective date of that statute. Compare Count 18 of the indictment in this case with Count 22 (A. 14a-16a). Such a manipulation of an inapplicable criminal statute to create a new offense not intended by the legislature and of which the defendant could have no warning until after commission of the acts complained of has frequently been struck down by this Court as violation of due process.

In *United States* v. *Resnick*, 299 U.S. 207, 209, 57 S. Ct. 126, 127 (1936), this Court held:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used." 299 U.S. at 209, 57 S. Ct. at 127.

This holding was further explained in *United States* v. *Alpers*, 338 U.S. 680, 681, 70 S. Ct. 352, 353 (1950):

> "no offense may be created except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses." 338 U.S. at 681, 70 S. Ct. at 353.

The peril such abuse of criminal statutes poses to the accused was stated by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347, 352, 84 S. Ct. 1697, 1702 (1964):

> "because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question." 378 U.S. at 352, 84 S. Ct. at 1702.

Petitioner contends that he as the alleged giver of the money cannot legally abet the receiver of the money under any reasonable construction of Section 2, Title 18, U.S.C. *Gebardi* v. *United States*, 287 U.S. 112, 119, 53 S. Ct. 35 (1932); *United States* v. *Dietrich*, 126 Fed. 664, 667 (D. Neb. 1904); *State* v. *Teahan*, 50 Conn. 92, appropriately quoted with approval in *Coffin* v. *United States*, 162 U.S. 664, 668, 16 S. Ct. 943, 945 (1896).

Section 7214(a)(2) is identical to Section 4047(e)(2), I.R.C., 1939, its predecessor, which in turn was derived from Congressional acts dating back to 1864 (see Legislative History after Section 7213, Title 26, U.S.C.). Indeed, it would appear that this section derives its language from the statute based on the common law concept of extortion which had its origin as far back as 1796. Thus, in *State* v. *Begyn*, 34 N.J. 35, 167 A. 2d 161, 166 the Court in referring to the fact that the extortion statute there had its origin in 1796 and was reiterative of the common law, stated:

> "The essence of that offense was the receiving or taking by any public officer, by color of his office, of any fee or reward not allowed by law for performing his duties."

The court added further:

> "The purpose would seem to be simply to penalize the officer who non-innocently insisted on a larger fee than he was entitled to or a fee when none

> was permitted or required to be paid for the performance of any obligatory function of his office. The matter was obviously of particular importance in the days when public officials received their compensation through fees collected and not by fixed salary." 167 A. 2d at 166.

It is to be noted that the language of the statute referred to in *State* v. *Begyn* is almost identical to the language in Section 7214(a)(2). That this was the history of Section 7214(a)(2) is indicated in *United States* v. *Gerdel,* 103 F. Supp. 635, 637-638 (E.D. Mo. 1952). Referring to Section 4047 (e)(2), the predecessor of Section 7214(a)(2), the Court there stated:

> "The law is aimed at 'extortion', 'fraud'—and those who knowingly charge more than authorized by law." 103 F. Supp. at 638.

Indeed, as also pointed out in *United States* v. *Gerdel,* the section contains an unusual penalty provision in support of the Congressional intent just referred to, wherein it directs the court to "render judgment" against the said officer or employee "for the amount of damages sustained in favor of the party injured", 103 F. Supp. at p. 638, to be collected by execution.

Thus, the entire history of Section 7214(a)(2) indicates that it was intended as an enactment to prohibit agents from exacting from persons appearing before them by "extortion" or "fraud" payments in excess of those that were properly due and collectible by such agents. Under these circumstances, the counts are legally insufficient because the petitioner could not aid and abet the commission of an extortion or fraud upon himself.

As Judge Friendly pointed out in his concurring opinion below (slip sheet opinion, p. 1846), it is contrary

to basic principles of criminal responsibility to use 18 U.S.C. §2 to convict an accountant who pays an Internal Revenue agent of aiding, abetting the agent in the receipt of that payment:

> "The ALI Model Penal Code, which uses the term 'accomplice' to encompass aiding and abetting, §2.06(3), says in §2.06(6):
>
> 'Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (b) the offense is so defined that his conduct is inevitably incident to its commission; . . .'
>
> This principle would seem peculiarly applicable when the legislature has enacted other provisions, here 18 U.S.C. §201, specifically directed against the payor, even though Congress decided in 1963 that these were not broad enough." (Slip sheet opinion, p. 1846)

The Court below upheld petitioner's conviction on the counts under 26 U.S.C. §7214(a)(2) (Slip sheet opinion, p. 1845) and on the first appeal (365 F. 2d at 399 n.3) relying upon its earlier decision in *United States* v. *Kenner*, 354 F. 2d 780, 785 (2d Cir. 1965).* In *Kenner, the Court below thought that the legislative history* of the 1951 Amendment to 18 U.S.C. §2 allowed the conviction of the payor of a Government agent as an aider and abettor under 26 U.S.C. §7214(a)(2). 354 F. 2d at

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* But for the *Kenner* decision, which petitioner contends was wrongly decided, a majority of the Court below would have held that petitioner and others similarly situated could not aid and abet the agents' violation of Section 7214(a)(2).

785. The legislative history contained in Senate Report 1020 (1951, 82d Cong. 1st Sess.), 1951 U. S. Code Cong. & Admin. Serv. 2378, 2583, is instructive. In changing the terminology of Section 2(b) of Title 18 from "which if directly performed by him would be an offense against the United States" to "which if directly performed by him *or another* would be an offense against the United States", Congress intended to reach persons other than Government employees who "cannot be prosecuted as principles under Section 2(a)" (*Ibid.*) It would seem then that what was intended by the 1951 Amendment to Section 2 was to reach persons who would otherwise be immune from prosecution rather than to multiply the number of possible offenses for which any one person might be prosecuted. Petitioner was subject to prosecution under old Section 201 of Title 18 for the period covered by the counts prior to the 1963 Amendment to that statute for payments to Internal Revenue employees, and after the 1963 Amendment was subject to prosecution under 18 U.S.C. §§201(b) and 201(f).

The cases cited in *Kenner* for the Court's conclusion that "a payor of a bribe [sic] can be an aider and abettor under 18 U.S.C. §2", 354 F. 2d at 785, do not support that statement. *May* v. *United States*, 175 F. 2d 994, 1003-04 (D. C. Cir. 1949), involved a conspiracy of three people to violate 18 U.S.C. §203. *United States* v. *Johnson*, 337 F. 2d 180, 196, involved a similar conspiracy and the court upheld the substantive charge of aiding and abetting a violation of 18 U.S.C. §281 by the payors because they were charged with acts beyond the mere payment. *United States* v. *Fromen*, 265 F. 2d 702, 705 (2d Cir. 1959), merely dealt with the sufficiency of evidence to support a conviction of aiding and abetting a bank officer in the misapplication of bank funds under 18 U.S.C. §650.

It is respectfully submitted that the description of an aider and abettor of an agent's violation of 26 U.S.C. §7214(a)(2) in the quotation from *Kenner, supra,* as "a payor of a bribe", is symptomatic of what this Court described in *United States* v. *Alpers, supra,* as forbidden "constructive offenses." 338 U.S. at 681, 70 S. Ct. at 353. The same symptom is shown by the opinion below: "Specifically Barash was indicted in substance for bribery." (Slip sheet opinion, p. 1844). By constructing a second bribery statute out of 26 U.S.C. §7214(a)(2) via 18 U.S.C. §2, the Court below has also demonstrated the impropriety of charging petitioner under that statute as well as under the express bribery statute, 18 U.S.C. §201, on the same transaction and the impropriety of affirming his conviction under both statutes as happened below in Counts 8, 10, 28 and 30.

2. It was error to submit to the jury the counts under 18 U.S.C. §201 as well as the counts under 26 U.S.C. §7214(a)(2).

In *Milanovich* v. *United States,* 365 U.S. 551, 81 S.Ct. 728 (1961), this Court had before it a dual conviction of Mrs. Milanovich for aiding and abetting a larceny from a Naval base and of receiving the currency from the same larceny. 365 U.S. at 552, 553, 554 n.5, 81 S.Ct. at 728, 729, 730 n.5. This Court in *Milanovich* approved that portion of the Fourth Circuit's decision which held:

> "'a defendant charged with offenses under statutes of this character may not be convicted and punished for stealing and also for receiving the same goods.'" 365 U.S. at 553-54, 81 S.Ct. at 729.

See also *Heflin* v. *United States,* 358 U.S. 415, 79 S.Ct. 451 (1959). Petitioner was faced with a directly analogous

situation in the trial below. Under Counts 1-16 he was charged with paying bribes to the agents named, while in Counts 21-32 he was charged, as an aider and abettor, with receiving those same payments from himself. When a defendant has been so convicted on both sets of counts as was appellant below, this Court held in *Milanovich* that it was not sufficient merely to vacate the sentence on what may be construed as the lesser offense, but that both convictions must be vacated because on a retrial a jury, on being properly instructed that it could not find petitioner guilty on both sets of counts, might conceivably convict him of neither. 365 U.S. at 553, 555, 81 S.Ct. 729, 730. In any event, this would be required in the present case because the court failed to charge the jury that it could not return a verdict of guilty on both sets of counts under 18 U.S.C. §201 and 26 U.S.C. §7214(a)(2) (A. 1003a-1004a). In fact, the trial court charged the jury that it could convict on both sets of counts (A. 1007a). The court's charge in this area further erred by failing to tell the jury how the elements of the Section 7214(a)(2) counts and the bribery counts were interrelated, as it did in connection with the parallel counts under Section 201(b) and Section 201(f) (A. 1013a-1014a).

On the first appeal of this case the Second Circuit suggested that the principle of *Milanovich* might apply. 365 F. 2d at 399 n.3. Before the second trial petitioner moved to dismiss one of the parallel sets of counts under Section 201 of Title 18 or the aiding and abetting counts under 26 U.S.C. §7214(a)(2), or in the alternative to compel the prosecution to elect between the two sets of counts. 266 F. Supp. at 127. Resolution of this motion was passed to the trial court, 266 F. Supp. at 129, and the trial court submitted both sets of counts to the jury. On appeal the question was not directly ruled upon. The main opinion by

Circuit Judge Moore agrees with the analysis in Point VI of appellant's brief below that in *United States* v. *Umans*, 368 F.2d 725 (2d Cir. 1966), the application of the *Milanovich* principle was neither briefed nor argued by the appellant nor discussed in the Second Circuit's opinion (Slip sheet opinion, p. 1843 at n.18). Circuit Judge Moore's opinion also is in agreement with Point VI of petitioner's brief below in pointing out that the issue is squarely raised in this case as it was not in *United States* v. *Cohen*, 387 F.2d 803 (2d Cir. 1968), because here petitioner was convicted on both sets of counts, whereas in *Cohen* the defendant was not. Circuit Judge Friendly in his concurring opinion points out that reference was made to the *Milanovich* principle in footnote 3 of the previous opinion in this case. 365 F.2d 394 at 399 n.3. Footnote 3 of the previous opinion below points out that although the fact situation in *United States* v. *Kenner*, 354 F.2d 780 (2d Cir. 1965) was simliar to the fact situation of the present case, the *Milanovich* problem was neither raised nor discussed in *Kenner* and also was not being considered by the Court below on the first appeal in this case.

a) A majority of the panel below thought Milanovich should apply.

Circuit Judge Friendly in a separate opinion in which Circuit Judge Feinberg concurred expressed serious doubt as to whether a payor of a bribe to an Internal Revenue agent can be properly charged at one and the same time with a violation of 26 U.S.C. §7214(a)(2) and 18 U.S.C. §201; and further finds additional doubt as to whether in such a situation a payor having been convicted under 26 U.S.C. §7214(a)(2) can also be convicted on the same transaction under 18 U.S.C. §201 because *Milanovich* would seem to forbid it. (Slip sheet opinion, p. 1846-47).

Peculiarly enough, however, Circuit Judge Friendly resolved these doubts against petitioner because of his belief that these issues were foreclosed by previous decisions of the court below. Thus, Circuit Judge Friendly concluded that the issue of whether a payor of a bribe can be properly charged at the same time with a violation of 26 U.S.C. §7214(a)(2) and 18 U.S.C. §201 was foreclosed in *United States* v. *Kenner, supra,* to which *United States* v. *Cohen, supra,* is cited as a "see also" reference. However, in the previous opinion of the court below on the first appeal, Circuit Judge Friendly, specifically pointed out that this issue of whether a payor could be charged both as a principal under 18 U.S.C. §201 and as an aider and abettor under 26 U.S.C. §7214(a)(2) ". . . was not raised or discussed in *Kenner*, and has likewise not been raised in this case." *United States* v. *Barash*, 365 F.2d at 399 n.3. In *Kenner*, the appellant had been acquitted of the bribery charges and convicted only of the gratuity counts. The same occurred in *United States* v. *Cohen, supra.*

With respect to the application of *Milanovich*, it becomes even more difficult to find any previous decision which foreclosed the application of the principle of that case that the petitioner could not be convicted of aiding and abetting in violation of 26 U.S.C. §7214(a)(2) and on the same transaction convicted of a violation of 18 U.S.C. §201 as petitioner was on the DeSibio counts (8 and 10). The nonexistence of any previous decision foreclosing reversal of petitioner's conviction in view of *Milanovich* may have been completely overlooked by Circuit Judge Friendly and Circuit Judge Feinberg who concurred. In both issues squarely raised by Circuit Judge Friendly, the questions posed were "*res nova*". In view of the statements made by Circuit Judge Friendly, again concurred in by Circuit Judge Feinberg, on an issue of such importance, involving

as it does the issues of due process, double jeopardy and the multiplication of convictions on single factual situations, there should be a reversal rather than an affirmance of the conviction.

From the many prosecutions for unlawful payments to Internal Revenue employees which the Court below has reviewed in recent years, such as *Kenner, Irwin,** *Umans, Cohen,* it may be seen that in all of these cases the indictment was returned after the 1963 revision to 18 U.S.C. §201, and that the prosecutor has used present Section 201(f) as a lesser offense under 18 U.S.C. §201(b) for payments after the effective date of the new statute and has used 18 U.S.C. §2 and 26 U.S.C. §7214(a)(2) instead of Section 201(f) for payments which ante-date the 1963 revision to 18 U.S.C. §201. This would seem to reflect that the prosecutors are (1) attempting to fill a legislative gap with an applicable statute, and (2) regard the 7214(a)(2) counts against a payor as a stopgap in the absence of 18 U.S.C. §201(f).

Either Section 7214(a)(2) should not be applied to the payor at all or it should be interpreted as another included offense according to the prosecutor's usage. See *United States* v. *Umans,* 368 F.2d at 728-29. At the trial below either the 7214(a)(2) counts against appellant should not have been submitted to the jury or the court should have instructed the jury that it could not return a conviction under both former 18 U.S.C. §201 and 26 U.S.C. §7214(a)(2) on any single alleged payment by appellant. As already noted, *Milanovich* indicates that in such a situation the remedy is not merely to vacate a conviction as to one of the two offenses, but to vacate all convictions for a retrial on a proper submission to the jury. 365 U.S. at 555, 81 S.Ct. at 730.

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* 354 F. 2d 192.

It should also be noted that in *United States* v. *Kenner, supra,* the Court below described a conviction of a payor under 26 U.S.C. §7214(a)(2) as "essentially a bribery of employees of the Internal Revenue Service." 354 F.2d at 782. The same description of that offense by petitioner occurred in the opinion below (Slip sheet opinion, p. 1844). Certainly, if the description of the offense under 7214(a)(2) in *Kenner* and in the opinion below is correct, on the evidence presented by the prosecution below in the case against petitioner, former Section 201 and Section 7214(a)(2) covered the same ground. This Court held in *Sansone* v. *United States,* 380 U.S. 343, 350, 85 S.Ct. 1004, 1009 (1965), that where on the facts of the case two statutes covered the same ground, it was error to make a dual submission to the jury.

There can be no doubt that petitioner was prejudiced by having the jury presented with 26 offenses rather than 13, particularly in view of the fact that the jury was forced by the trial court to deliberate a second time on the counts under former 18 U.S.C. §201 after it had already returned the verdict as to the same transactions under the 7214 counts and thus could no longer choose between the two offenses even if it were proper for the jury to make such a choice.

Is an aiding and abetting of 26 U.S.C. §7214(a)(2) a lesser included offense, assuming it is an offense by the payor at all, under former 18 U.S.C. §201 before the revision of that statute or not? The Second Circuit holds not, even though the prosecutor uses that charge as an equivalent to 18 U.S.C. §201(f) before the effective date of that statute and the Second Circuit has held that 18 U.S.C. §201(f) is a lesser included offense of 18 U.S.C. §201(b), 368 F.2d at 730, and that §201(f) and 26 U.S.C. §7214(a)(2) have a lesser requirement of intent than §201, 365

F.2d at 402. The risk to all of this holding should be obvious.

On the rationale of the Second Circuit, an alleged maker of a payment to an Internal Revenue agent may be faced with a triple set of counts on the same alleged payment, 18 U.S.C. §201(b) and §201(f), in the alternative, and, in addition to both, aiding and abetting the agents' violation of 26 U.S.C. §7214(a)(2). How could any jury possibly avoid convicting a defendant of something on such a multiplicity of charges which the trial court is incapable of separately defining for the jury in any meaningful sense?

3. It was error for the Court to exclude the defense of economic coercion from the counts under 26 U.S.C. §7214(a)(2) and 18 U.S.C. §201(f).

The Court charged the jury that it could consider "pressure" exerted by an office auditor on appellant.

> "as bearing on the issue whether the defendant in making such payment or payments had the intent to influence official action, which is an essential element of the offense under [§201].
>
> "On the other hand, such conduct of Clyne, that is the pressure to secure money from the defendant, if you find that there was such conduct, is irrelevant to the offenses under the aiding and abetting statute charged in Counts 21 through 26 and 28 throught 32. It is irrelevant to the offenses under section 201(f) statute charged in Counts 18 and 20 and such conduct, if you find it existed, should not be considered by you in connection with these last mentioned counts." (A. 1018a).

Exception was taken to this portion of the charge (A. 1033a).

In so charging, the trial court evidently construed the Second Circuit's opinion on the first appeal of this case to rule out the defense of economic coercion as to the counts under 18 U.S.C. §201(f) and 26 U.S.C. §7214(a)(2). See 365 F. 2d at 402. However, the Court of Appeals did not specifically rule on this question, but said:

> "While it is arguable that this is also true with respect to giving gratuities under 18 U.S.C. §201(f), or to being an accessory to the receipts prohibited by 26 U.S.C. §7214(a), offenses which have no requirement of specific intent, see United States v. Irwin, supra, 354 F. 2d at 197, and carry a significantly lower punishment, we incline to the view that as to these offenses economic pressure is irrelevant." 365 F. 2d at 402.

Irwin only dealt with 18 U.S.C. §201(f) (not 26 U.S.C. §7214(a)(2)). While 201(f) has a two year maximum, 7214 has a five year maximum. Former Section 201 which was paired with the 7214 counts below carried a maximum sentence of three years.

The Court below held in *United States* v. *Irwin*, 354 F. 2d 192 (2d Cir. 1965), however, that under 18 U.S.C. §201(f):

> "The making of a gift 'for or because of any official act' limits the prohibition against the act of making a gift to a public official to those which are accompanied by and are made with this particular state of mind, design or purpose, which is the essence of intent. Whether this is regarded as a specific intent or as a limitation on the acts that are within the purview of the subsection is of no consequence. The state of mind with which the act is done is an essential element of the offense which the Government must prove." 354 F. 2d at 197.

Nothing said in the first *Barash* opinion undercuts this requirement.

However Section 7214(a)(2) and Section 201(f) be construed, the prohibited action must be deliberate and purposive. This may be best illustrated by the counts under Section 7214(a)(2) where petitioner is charged as an aider and abettor, i.e., that by giving Clyne and DeSibio the payments alleged he intended to induce their improper receipt of unauthorized payments. As the trial court charged the jury it had to:

> "find that the defendant, in some way, associated himself with the criminal venture, that he participated in it as something he wished to bring about, that he, by his act or acts endeavored to make it successful." (A. 1007a).

In *United States* v. *Umans*, 368 F. 2d 725, 728 (2d Cir. 1966), the Court below held that such an instruction is required. *Cf. United States* v. *Byrd*, 352 F. 2d 570, 576 (2d Cir. 1965). Most recently, Chief Judge Lumbard in a concurring opinion in *United States ex rel Rosado* v. *Flood*, 394 F. 2d 139 (2d Cir. 1968), held:

> "In order to aid and abet another to commit a crime, it is necessary that one 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed'." 394 F. 2d at 142.

According to petitioner's version of his transactions with auditor Clyne, the few payments petitioner made were in response to Clyne's demands and his threats to withhold action on audits he conducted with petitioner, to impose improper disallowances, to institute time-consum-

ing and costly procedures, and to see that petitioner received similar treatment from auditors in other groups, all of which petitioner feared would ruin his accounting practice. It would appear that the jury gave petitioner's version of the transactions weight for they did not convict petitioner on a single bribery count involving Clyne. Indeed, they acquitted petitioner on three such counts. Petitioner also adduced testimony showing that DeSibio shared payments extracted from taxpayers and representatives with Clyne and worked with him in such matters (A. 301a-304a, 432a-40a). Had the jury been allowed to consider the defense of economic coercion on the counts under Section 7214(a)(2), they might well have reached a similar conclusion. In terms of the present case the jury had to find that petitioner made the payments charged because he wished to do so, because he wanted the office auditors to receive unauthorized payments from him. Petitioner's testimony is directly to the contrary. He did not wish to pay Clyne anything and told Clyne on several occasions that he would not pay him in connection with any audit. Clyne himself admitted he told Coady that petitioner, unlike other accountants, was unwilling to pay and that constant threats and coercion had to be applied to petitioner in order to receive even the tiniest of sums. Thus, there was ample evidence in the record from which the jury could have concluded that petitioner did not wish the office auditors' criminal ventures to succeed and that, in fact, petitioner attempted to resist the auditors' criminal schemes by refusing to make payment, and indeed, by attempting to avoid such auditors. By excluding this evidence from the jury on the 201(f) and 7214 counts the trial court not only committed error *per se*, it also destroyed the effect of its exceedingly brief instruction on aiding and abetting. This allowed the jury to convict petitioner on the 7214(a)(2) counts as they did in

their first verdict (A. 1064a), even though they found that petitioner's activities in connection with the auditors' admitted offenses under Section 7214, in effect, amounted to little more than having the auditors put their hands in his pockets and remove the alleged amounts of money. The record of the trial below shows that petitioner was an extremely reluctant payor who responded only to economic coercion, as the Court of Appeals recognized in its opinion on the first appeal, 365 F. 2d at 400-402.

In *Tomoya Kawakita* v. *United States*, 343 U.S. 717, 72 S. Ct. 950 (1952), this Court recognized that acts performed under economic or other duress would not be criminal :

> "Of course, an American citizen who is also a Japanese national living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere nonperformance of the acts complained of would be a breach of Japanese law. He may have employment which requires him to perform certain acts. The compulsion may come from the fact that he is drafted for the job or that his conduct is demanded by the laws of Japan. He may be coerced by his employer or supervisor or by the force of circumstances to do things which he has no desire or heart to do. That was one of petitioner's defenses in this case. Such acts—if done voluntarily and willfully—might be treasonable. But if done under the compulsion of the job or the law or some other influence, those acts would not rise to the gravity of that offense. The trial judge recognized the distinction in his charge when he instructed the jury to acquit petitioner if he did not do the acts willingly or voluntarily 'but so acted only because performance of

the duties of his employment required him to do so or because of other coercion or compulsion.'" 343 U.S. at 735, 72 S. Ct. at 961.

Earlier in *Union Pac. R. Co. v. Public Service Commission of Missouri*, 248 U.S. 67, 70, 39 S. Ct. 24, 25 (1918), this Court, speaking through Mr. Justice Holmes, stated:

"The Railroad Company and its officials were not bound to take the risk of these threats being verified. . . It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." 248 U.S. at 70, 39 S. Ct. at 25.

Relying on that opinion, the New York Supreme Court in *Hornstein v. Paramount Pictures*, 37 N.Y.S. 2d 404, 413, 415 (Sp. T. N. Y. Co. 1942), unanimously affirmed 266 App. Div. 659, unanimously affirmed 292 N.Y. 468, 66 N. E. 2d 740, ruled:

"Statutes sometimes make the doing of an act criminal without regard to the doer's intent or knowledge . . ., but I think no statute ever attempted to make involuntary action a crime." 37 N.Y.S. 2d at 413.

"Blackmail, extortion, and an infinite variety of forms of duress have been familiarities in the law for centuries, and while they doubtless would have been wiped out long ago if all citizens refused submission, I think no instance can be found—certainly none has been cited—in which submission has been made the basis of either criminal or civil liability. On the contrary, the law always has treated the

> submitter to illegal exaction as a victim rather than a wrongdoer and outrager of public policy. Usury, which clearly is contrary to the public policy of this state would not exist if no citizen submitted to the exactions of the usurer, but those who do submit certainly are not classed as violators of public policy because they thereby encourage usuary and make it possible." *Hornstein* v. *Paramount*, 37 N.Y.S. 2d at 415.

The same considerations apply to Counts 18 and 20 under 18 U.S.C. §201(f). As the trial court charged the jury under those counts:

> "there must be proof that the act of the defendant was done knowingly, that is voluntarily and intentionally and not by accident, mistake or some other reason. . . ." (A. 1013a)

This instruction was also undercut by the Court's later charge that economic coercion was irrelevant to the offenses under that statute (A. 1018a).

The record below fairly indicates that had the issue of economic coercion not been excluded from the jury's consideration the verdict might well have been otherwise.

a) The Court below presumed that the jury considered the defense excluded by the trial court.

Although the panel of the Court of Appeals which heard the previous appeal then pointed out that it had inclined to the view that economic pressure was irrelevant to the counts under 26 U.S.C. §7214(a) and 18 U.S.C. §201(f), significantly on the second appeal the Court below did not base its affirmance on that ground. Rather, the Court

seemed to hold that such evidence was relevant and was considered by the jury on the criminal intent which is a necessary element under the so-called gratuity counts. Judge Moore's opinion concluded on this point that even though the trial court charged the jury that it could not consider the evidence of economic or other pressure on the so-called gratuity counts, that because the jury heard such evidence from petitioner and through the cross-examination of ex-office auditor Clyne, it would be assumed for the purposes of appellate review that the jury nonetheless did consider that evidence on the so-called gratuity counts. Judge Moore's opinion reads:

> "Appellate courts will never know how much or how little a jury is able to absorb from the reading of stilted indictments and adverbial statutes, from the specification of a series of essential elements necessary to convict and the 'boilerplate' forced upon trial judges by time-honored and cumulative decisions. Refuge must be sought in trying to appraise the charge as a whole and to decide whether the jury would have been able to place the template of essential elements upon the factual mat laid out before it and thus determine a violation of the law. *Such an approach leads to the belief that, if the jury had wished to accept Barash's version that he was the innocent victim of Clyne's economic pressure, the charge adequately gave it this choice as to the counts where it could have been a factor in reaching their determination.*" (Slip Sheet Op. pp. 1831-2) (Emphasis added)

This opinion of the Court below reflects a startling departure from decisions of this Court which have consistently held that the presumption is that the jury *follows* the trial court's charge, particularly where limiting instructions have been given.

In *Bruno* v. *United States*, 308 U.S. 297, 60 S. Ct. 198 (1939), the prosecution argued, as the Second Circuit seems to hold, that it was not error to refuse a defendant's requested proper instruction because the jury would have disregarded it anyway. Mr. Justice Frankfurter, writing for a unanimous court reversing the conviction, ruled that it is error for an appellate court to rely on "a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court . . ." 308 U.S. at 294, 60 S. Ct. at 201. Again, in *Delli Paoli* v. *United States*, 352 U.S. 232, 242, 77 S. Ct. 294, 300 (1957), this Court held:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." 352 U.S. at 242, 77 S. Ct. at 300.

No other inference is possible than a departure from the standards set by this Court when the Court below stated: "if the jury had wished to accept Barash's version that he was the innocent victim of Clyne's economic pressure, the charge adequately gave it this choice as to counts where it could have been a factor in reaching their determination." (Slip Sheet Op. pp. 1831-32). As the aforecited decisions emphatically state, the jury is presumed to have followed the charge of the trial court which expressly ex-

cluded the evidence of economic pressure or coercion from its consideration. The trial court below charged: ". . . the pressure to secure money from the defendant . . . *should not be considered by you* in connection with these last mentioned counts [18, 20-32]." (A. 1018a).

It is clear from the record in this case that the jury followed this limiting instruction on how the evidence should be applied in this case. On all the counts which the court charged the jury that it could consider economic pressure or coercion, that is, Counts 1-6, 9, 11-14, the jury either acquitted appellant or disagreed. On none of these counts was a verdict of conviction returned. On the reciprocal of these counts, which charged the very same transactions as in those enumerated but under 26 U.S.C. §7214(a)(2) and 18 U.S.C. §201(f), where the court's charge excluded from the jury's consideration the evidence of economic pressure or coercion, the jury returned in each instance a verdict of guilty.

4. Allowing a conviction of an alleged offense induced by an undercover agent on evidence manufactured by him brings our system of criminal justice into disrepute.

The Court below upheld the trial court's refusal to instruct the jury on the law of entrapment as it applied to the facts of the case (Slip Sheet Op., p. 1832). In so doing, it reached a result directly contrary to this Court's decision in *Sorrells* v. *United States*, 287 U.S. 435, 422-43, 53 S. Ct. 210, 213 (1932). In *Sorrells* this Court held a defense of entrapment was available where the defendant admitted the commission of acts which would be a crime without the inducement of a Government officer *in addition* to circumstances where the Court of Appeals had held that such a defense was available. One of those circumstances was where "the accused is placed in the

attitude of having committee a crime which he did not intend to commit." 287 U.S. at 422, 53 S. Ct. at 213, and the example given was a sale of liquor to an Indian who was disguised so as to mislead the accused as to his identity (*Ibid.*) Inspection agent Coady disguised the fact that he was an undercover agent, never told petitioner that any act Coady did was considered by Coady to be improper, knew from Clyne that petitioner actively resisted making payments to auditors, posed as a penniless auditor in need of funds to satisfy his obligations before entering the Armed Forces. These poses and circumstances were what led petitioner to part with the $50.00 and they had nothing to do with the audit. Later, without any action on the part of the petitioner, Coady falsified his report on the Kaiser audit to "prove" that a fraudulent audit had been conducted. Unfortunately, by misunderstanding the applicable law and the facts of the case, the trial court erroneously removed the issue of entrapment from the jury.

The decision below is also in conflict with decisions of the Fifth Circuit. See *Sears* v. *United States,* 343 F. 2d 139, 143 (5th Cir. 1965) and *Henderson* v. *United States,* 237 F. 2d 169 (5th Cir. 1956).

There can be little doubt that the refusal to charge on entrapment tipped the scales against petitioner. The jury refused to convict petitioner of bribing Coady (Count 16) and only returned a guilty verdict under 18 U.S.C. §201(f) Count 20) on the second partial verdict. Had the law of entrapment been explained to the jury it might very well have acquitted petitioner on Count 20 as well.

To allow a conviction to stand on an offense manufactured by an under cover agent can have only a negative deterrent effect on others.

5. A coerced verdict vitiates the right to trial by jury.

At the trial below the court gave the jury an abbreviated dynamite charge* (A. 1064a-66a) to which exception was taken (A. 1066a-67a). The dynamite charge was given below after the jury returned its first partial verdict on the counts under 27 U.S.C. §7214(a)(2). (A. 1064a). It is respectfully submitted that the trial court erred in giving this charge because it was coercive in and of itself and in the context in which it was given.

When counsel for petitioner excepted to the dynamite charge, the court justified its instruction by stating:

> "the jury has never advised us that they are deadlocked." (A. 1067a)

An indication of deadlock, however, is the condition precedent for the dynamite charge even in those cases where the charge has been tolerated. In *Green* v. *United States*, 309 F. 2d 852, 856 (5th Cir. 1962), the Fifth Circuit reversed a conviction where the *Allen* charge had been given before any indication that the jury was deadlocked. The Court stated:

> "In this case the dynamite exploded before there was any reason to think that blasting was necessary; the trial judge gave the charge before the jury retired . . . . The vice in the charge was the court's interference with the jury function. No matter when the charge was made, it gave the jury false notions of the validity and force of majority opinion; it tended to limit full and free discussion in

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* The trial court used a modified version of the charge from *Allen* v. *United States*, 164 U. S. 492, 501-02 (1896). Recently this Court had before it a case in which a coercive charge was used in a proceeding against a juvenile. *Kent* v. *United States*, 383 U. S. 541, 552 n. 13, 86 S. Ct. 1045, 1052 n. 13 (1966).

> the jury room; it prejudiced the right of an accused to a hung jury and a mistrial by tending to stifle the dissenting voices of minority jurors." 309 F. 2d at 856.

See also *United States* v. *Smith,* 353 F. 2d 166, 168 (4th Cir. 1965); *United States* v. *Rogers,* 289 F. 2d 433, 436 (4th Cir. 1961).

The jury below deliberated for two days. The *Allen* charge was given shortly after noon on Saturday, October 21, 1967, the second day of deliberation (A. 1062a-66a). Shortly before midnight on Friday, October 20, 1967, at the conclusion of the first day's deliberation, the court instructed the jury:

> "If during the morning you reach a point where you are agreed on a verdict as to any count or counts we can take the verdict on that count or counts if you will just let the Marshal know and you can *then continue the deliberation on the other counts.*" (A. 1039a; emphasis added)

This was a clear instruction to the jury that it would be required to deliberate throughout the weekend until it reached a verdict on all counts. There was no announcement to the jurors that they had the right and duty to adhere to their individual opinions and there was a complete absence of assurance by the court that it had no intention to coerce the jurors and that it would accept the jury's ultimate decision whatever it might be. See *Jenkins* v. *United States,* 380 U.S. 445, 85 S. Ct. 1059 (1965); *Rice* v. *United States,* 356 F. 2d 709, 715, 717-18 (8th Cir. 1966).

That the procedure followed by the trial court was intended to coerce a verdict is clear from the court's own statement:

> The Court: They are under a compulsion, and if they hang up I will give them the Allen charge. They are under a compulsion. I do not believe in telling juries that it is within their province to disagree. I don't think so. I think they should return a verdict." (A. 977a)

This view and the action of the trial court which stemmed from it were error, as this Court held in *Bucklin* v. *United States*, 159 U.S. 680, 686, 16 S. Ct. 182, 184 (1895):

> "To say that the court would not receive from the jury a report of a disagreement as to one defendant was, in effect, to announce that the jurors would be held together until the court should deem it to be its duty to discharge them finally, and would not be discharged unless or until they returned a verdict of guilty or not guilty. This tended to coerce the jury into making a verdict." 159 U.S. at 686, 16 S. Ct. at 184.

The next morning the effect of these coercive instructions was heightened when, during the middle of the second day of deliberations on Saturday, October 21, 1967 the court accepted a verdict on Counts 21-26 and 28-32 and immediately thereafter gave the jury the dynamite charge as to the necessity of reaching a verdict as to all remaining counts (A. 1964a-66a). After several more hours deliberation, the jury returned a second partial verdict on which a conviction was returned (A. 1069a).

The *Allen* case was decided by this Court in 1896. The use of what has come to be known as the dynamite charge from that case has repeatedly posed a problem among the various Circuits. It is respectfully suggested that the time is ripe for this Court to rule on what, if any, circumstances render its use proper.

a) The erroneous compulsion of succesive verdicts.

The instructions to the jury were further coercive in that after the jury returned its first verdict on the second day of deliberations (as to the counts under 26 U.S.C. §7214(a)(2), A. 1062a-64a) and announced neither a verdict nor disagreement on the other counts as the trial court recognized (A. 1067a), over the objection of defense counsel (A. 1040a, 1060a-61a), the trial court treated the jury's verdict on these counts as a "partial verdict" and directed the jury through the *Allen* charge to deliberate further. This was error for two fundamental reasons: it denied petitioner his right to an acquittal on the open counts, and it was beyond the power of the court under the Federal Rules of Criminal Procedure.

This Court long ago held in *Dealy* v. *United States*, 152 U.S. 539, 542, 14 S. Ct. 680, 681 (1894), and *Jolly* v. *United States*, 170 U.S. 402, 18 S. Ct. 624, 626 (1898), that where a jury returns a verdict as to some counts but not as to others, the jury's silence is the equivalent of a verdict of not guilty as to those counts. This view was later adhered to in *Green* v. *United States*, 355 U.S. 184, 190-91, 78 S. Ct. 221, 225 (1957). See also *Bennett* v. *United States*, 89 F. 2d 52 (5th Cir. 1937); *Chadwick* v. *United States*, 117 F. 2d 902, 904 (5th Cir. 1941), cert. den. 313 U.S. 585, 61 S. Ct. 1109 (1941). Under these precedents, there is little room to doubt that, had the trial court accepted the jury's first verdict, petitioner would have been entitled to the entry of a judgment of acquittal on all the remaining counts. By resubmitting the remaining counts to the jury, the trial court not only denied petitioner the acquittal to which he was entitled, it adopted a procedure which impinged upon petitioner's constitutional guarantee against double jeopardy. These principles have a particular application to this case where

the counts resubmitted to the jury were a prosecutorial recasting of the same facts into a different legalistic form as separate offenses with more severe consequences for appellant. See *Green* v. *United States, supra; Dealy* v. *United States, supra; Jolly* v. *United States, supra.* Indeed, in *Bennett* v. *United States, supra,* and *Chadwick* v. *United States, supra,* the jury's silence was given the weight of acquittal where the counts on which they were silent were successive counts of mail fraud (*Bennett*) and illegal distribution of narcotics (*Chadwick*), which were in no way dependent upon or variants of the counts on which a verdict had been returned.

Rule 31 of the Federal Rules of Criminal Procedure explicitly provides that a verdict may be received on less than all counts only in the case of multiple defendants. Even as to multiple defendants Rule 31(b) does not provide for repeated submissions to the same jury but only that "the defendants as to whom it does not agree may be tried again." The Notes of the Advisory Committee state that Rule 31(b) "is a restatement of existing law, 18 U.S.C.A. former §566." Former Section 566 of Title 18 U.S.C.,* as Rule 31(b), provided only for the receipt of a partial verdict as to one or more defendants in a multi-defendant trial. No part of that statute or any other authorized the receipt of partial and successive verdicts as to a single defendant tried alone. There can be no doubt that Rule 31 received thorough and careful consideration by the Advis-

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*"Same; several joint defendants. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury." R.S. §1036, derived from Act June 1, 1872, C255, §10, 17 Stat. 198.

ory Committe, the Supreme Court, and many commentators and practitioners. Reflected in the various drafts as they worked their way to the final Rule was a deep and deliberate concern to prevent any interference with the jury's function in returning one unanimous verdict as to any defendant—or no verdict—as to each count.

b) Imputing guilt to petitioner from the pleas of co-defendants.

The trial court also may well have influenced the jury's verdict by allowing the ex-auditors whom petitioner was charged with aiding and abetting to enter a guilty plea for him. Cylne and DeSibio each testified on direct examination that they had pleaded guilty to the counts in the indictment which charged them with receiving payments from petitioner (A. 46a, 379a). Lupesco, another ex-auditor who introduced petitioner to the undercover agent, who was not even named in the indictment on which trial was had, was allowed to testify over objection that she had pleaded guilty to counts charging her with improper receipt of payments in other indictments involving other taxpayers' representatives (A. 454a). Petitioner submitted a written request to charge the jury, *inter alia*:

> "The fact that a Government witness may have entered a plea of guilty to any of Counts 21 to 32 does not authorize you to find as a fact each of the elements which I have just outlined to you in these counts." (Defendant's Request No. 13, A. 1087a)

This charge was not given and in fact the trial court did not charge the jury in that language or give any equivalent protective instruction concerning the plea of guilty by the co-defendants or Lupesco. In fact, the court's charge could very well have given the jury the impression that

they could infer petitioner's guilt from the guilty pleas of his co-defendants.*

The Second Circuit held that petitioner waived the point by not objecting to the omission of the requested instruction from the trial court's charge in addition to submitting the written request. That decision is a clear departure from the decisions of this Court holding that either a request to charge or an exception to the charge as given is sufficient to put the trial court on notice and preserve the error for review on appeal. *Boyd* v. *United States*, 271 U.S. 104, 107, 46 S.Ct. 442, 443 (1926); *Lopez* v. *United States*, 373 U.S. 427, 436, 83 S.Ct. 1381, 1386 (1963).

Indeed, in a case such as the present one an instruction that a witness' testimony as to his plea of guilty to the very offense for which the defendant is on trial cannot be used as an implication of the defendant's guilt should be a condition precedent to the submission of such testimony to the jury. This caution was omitted from the charge be-

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* The court said:

> "However, so that nothing I may have said confuses the jury I point out that Mr. Clyne and Mr. DeSibio pleaded guilty to the offense of receiving from Mr. Barash while an employee acting under a revenue law payment for the performance of a duty in violation of Section 7214(a)(2) which we considered a moment ago." (A. 1017a)

The court further charged:

> "You will consider whether these witnesses, Clyne DeSibio and Miss Lupesco, bared themselves publicly before you made a clean breast of their wrongdoing and told the truth. In short, have they decided after being caught to come clean and to tell the truth? Those are questions that you, the jury, must answer." (A. 1025a)

low; indeed the court very nearly charged the contrary, and, thus, although petitioner was attempting to exercise his Constitutional right to a jury trial on his plea of not guilty, his co-defendants were improperly allowed, in effect, to enter a guilty plea for him.

6. An indictment is invalid which has been returned by a grand jury which has not heard the evidence allegedly in support of it.

This case presents a much more grave abuse of the grand jury system than was before this Court in *Umans* v. *United States*, 389 U.S. 80, 88 S.Ct. 253 (1967). In *Umans*, this Court dismissed the writ of certiorari as improvidently granted after the United States Attorney for the Southern District of New York represented that since the Second Circuit's opinion in *Umans* criticizing the use of affidavits before the grand jury rather than the live testimony of the affiants, that practice had discontinued. The prosecutor represented below (Appellee's brief below, p. 38) that the ex-office auditors who testified at petitioner's trial had personally testified before a grand jury *but that grand jury was not the grand jury which returned the indictment against petitioner.*

No known case approves such a procedure. Compare *United States* v. *James*, 290 F.2d 866, 869 (5th Cir. 1961), holding proper the return of a superseding indictment without further evidence by the *same* grand jury which, after hearing proper evidence, had returned the previous indictment. The procedure utilized to secure the indictment against petitioner makes a mockery of the Fifth Amendment's guarantee that he should not be held to answer the felonies charged except by action of the grand jury. Presentment of allegedly proper evidence to a grand

jury which in no way considered the indictment against petitioner nor returned it, cannot justify the lack of proof before the grand jury which did indict appellant. Compare *United States* v. *James, supra.*

Respondent's contention below that the grand jury proceedings however defective cannot be questioned because petitioner has already undergone a trial at which allegedly sufficient evidence has been produced which the indicting grand jury might have properly considered had the prosecution presented it (A. 1074a) is astounding. This Court has repeatedly held that a conviction, no matter how thoroughly proven at trial, cannot be based on a charge which was not considered and returned *en toto* by the indicting grand jury. *Ex parte Bain*, 121 U.S. 1, 8 S.Ct. 781 (1887), and cases therein cited; *Stirone* v. *United States*, 361 U.S. 212, 219, 80 S.Ct. 270, 274 (1960), and cases there cited.

It is respectfully submitted that the time has come for the Court to put an end to the prosecutor's practice of using the grand jury solely to perform the ministerial function of handing up an indictment presented to it by the prosecutor.

7. Petitioner did not receive a fair trial.

Should the writ be granted in this case, petitioner wishes to reserve the right to demonstrate that he did not receive a fair trial for additional reasons.

CONCLUSION

For these various reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS BENDER,
Attorney for Petitioner.

LLOYD A. HALE,
Of Counsel.

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 45—September Term, 1968.

Docket No. 32225

UNITED STATES OF AMERICA,

Appellee,

—against—

DAVID BERNARD BARASH,

Defendant-Appellant.

Before

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

[1825]

Appeal from a judgment after a jury trial in the Southern District of New York, Wyatt, *Judge,* convicting defendant of bribing and giving gratuities to internal revenue agents in violation of 18 U.S.C. §201, and aiding and abetting the receipt of rewards unauthorized by law in violation of 26 U.S.C. 7214(a)(2).

Affirmed.

LOUIS BENDER, New York, N. Y. (Lloyd A. Hale, New York, N. Y., of counsel), *for defendant-appellant.*

[1826]

DAVID M. DORSEN, Assistant United States Attorney, New York, N. Y., Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., John E. Sprizzo, Assistant United States Attorney, of counsel, *for plaintiff-appellee.*

MOORE, *Circuit Judge*:

This is an appeal by David Bernard Barash from a judgment of conviction entered against him in the district court, after a ten-day jury trial. The case was before the district court upon remand after this court reversed a previous conviction of Barash at a first trial. *United States* v. *Barash,* 365 F. 2d 395 (1966).

The indictment named Barash, a certified public accountant and attorney, in 32 counts relating to 16 transactions in which he was alleged to have made improper payments to several Internal Revenue Service agents in return for favorable adjustments in connection with audits of personal income tax returns of Barash's clients. Counts 1 through 12 charged him with offering, promising and giving bribes to 3 agents with intent to influence office audit examinations in violation of the prior 18 U.S.C. §201, and counts 13 through 16 charged him with the same crime in violation of the present statute, 18 U.S.C. §201-(b).[1] Counts 17 through 20 charged a violation of 18

[1] Counts 13 through 16 relate to transactions which took place after January 21, 1963, when the present statute came into force. The present §201(b) contains no change of substance from the prior §201. See *United States* v. *Barash,* 365 F. 2d 395, 398, f. 1 (2d Cir. 1966).

U.S.C. §201(f), which makes it a crime to pay a public official a sum of money "for or because of any official act [1827]
performed or to be performed" by them. Counts 21 through 32 charged Barash with aiding and abetting[2] the violation of 26 U.S.C. §7214(a)(2), which proscribes revenue officers from knowingly demanding or receiving sums of money except as prescribed by law.

At the first trial, Barash was acquitted on counts 7, 13, 15, 17, 19 and 27, relating to alleged unlawful payments to Internal Revenue Service agents Montello and Wolf, but was convicted on the remaining counts, which concerned agents Clyne, DeSibio and Coady. He was sentenced to concurrent terms of imprisonment of a year and a day on each count. On appeal, this court reversed and remanded for a new trial because hearsay testimony was erroneously admitted, cross-examination was improperly restricted and the charge to the jury was in error in two respects, namely, (1) threat of economic harm as an element of intent, and (2) payment alone sufficient to establish intent.

At the second trial, there were thirteen pairs of counts representing, and numbered identically as, those upon which Barash had been convicted at the first trial, charging unlawful payments to Clyne, DeSibio and Coady. On October 21, 1967, the jury returned a verdict of guilty on counts, 8, 10, 18, 20-26 and 28-32. On the other counts the jury either returned a verdict of not guilty, or reported that it was unable to agree. Barash was sentenced to concurrent terms of imprisonment for nine months and a fine

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[2] 18 U.S.C. §(2) reads: "Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

of $1,000 on each of counts 21-26 and 28-32; to terms of imprisonment of five years, execution suspended, with a fine of $2,500 on each of counts 8 and 10; and to terms of [1828]
imprisonment of two years, execution suspended with probation of five years, and a fine of $2,500 on each of counts 18 and 20. The total fine was $21,000.

The Facts

The Government's case against Barash consisted of the testimony of agents Clyne and DeSibio, who had pleaded guilty to charges against them in the indictment, and that of Coady, a Government undercover agent. Clyne, involved in all but three of the transactions resulting in convictions, gave substantially the same testimony at the second trial that he had given at the first.[3] He testified that Barash paid him a total of $225 for false audits in 1960, followed by lesser sums in each of the succeeding three years. DeSibio gave testimony as to two similar transactions in 1961 involving payments of about $25 each. Coady, the undercover agent, testified that he met Barash in 1963 upon an introduction by a former Internal Revenue Serv-

[3] The opinion in the first Barash appeal summarized the nature of the transactions as follows.

> Barash would inform Clyne of clients who had received "call-in" letters instructing them to appear for audit of their returns before the group of agents that included Clyne. In violation of office procedures Clyne would obtain the returns and related papers from his supervisor's file and assign the audits to himself. Barash would suggest relatively small disallowances in unsubstantiated deductions for travel and entertainment expenses, and would offer Clyne compensation for thus passing the returns.

ice auditor, Miss Jeanne Lupesco,[4] and upon the request of Barash assigned an audit to himself, contrary to normal office procedure, and approved certain deductions without any inquiry as to their accuracy. A few minutes [1829]
later, according to Coady's testimony, Barash gave him an envelope containing $50.

Appellant's defense consisted of his own testimony and that of some additional witnesses who testified as to his good reputation. Barash, on the stand, admitted that he gave money to Clyne on several occasions[5] but said that those transactions were Christmas gifts having nothing to do with the audits. The money, explained Barash, had been given merely to create a more pleasant working atmosphere. In response to the testimony of DeSibio, Barash said that he had taken DeSibio to lunch upon the conclusion of a normal audit. Both Clyne and DeSibio, Barash suggested, had implicated him to gain mitigation of sentences they were to receive for crimes arising from these and other transactions. And finally, Barash testified that his $50 payment to Coady was wholly unrelated to the audit performed, but was given out of sympathy induced by Coady's indication that he was in debt and was soon to go to a Marine training camp.

Defense of Economic Coercion

In the first of many claims of reversible error, Barash asserts that it was error for the trial judge to exclude the

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[4] Coady's testimony concerning this introduction was substantially the same as that of Miss Lupesco. Miss Lupesco also testified that in 1958 she had conducted an audit favorable to Barash's client and was thereafter given $80 in cash by Barash.

[5] Barash testified that he gave Coady Christmas gifts of $25 or $50 in 1960, 1961 and 1962, and that he gave another $50 to Coady in January, 1963. [See corections on rehearing, *infra*.]

defense of economic coercion from the jury's consideration of the counts under 26 U.S.C. §7214(a)(2) and 18 U.S.C. §201(f), the provisions covering unlawful payment of gratuities. In the first appeal of this case we said:

> We think that if a government officer threatens serious economic loss unless paid for giving a citizen his due, the latter is entitled to have the jury con-
> [1830]
> sider this, not as a complete defense like duress but as bearing on the specific intent required for the commission of bribery. Cf. *United States* v. *Miller*, 340 F. 2d 421, 425 (4th Cir. 1965). While it is arguable that this is also true with respect to giving gratuities under 18 U.S.C. §201(f), or to being an accessory to the receipts prohibited by 26 U.S.C. §7214(a), offenses which have no requirement of specific intent, see *United States* v. *Irwin*, [354 F. 2d 192, 197 (2d Cir. 1965), *cert. denied*, 383 U. S. 967, 86 S. Ct. 1272, 16 L. Ed. 2d 308 (1966)], and carry a significantly lower punishment, we incline to the view that as to these offenses economic pressure is irrelevant. 365 F. 2d at 401.402.[6]

Although criminal intent is a necessary elment for conviction under the gratuity counts, no specific intent is required. In this case, accepting Barash's version of the facts, the payments were received by the auditors "otherwise than as provided by law for the proper discharge of official duty," as provided for in §201(f).[7] In measuring

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[6] Two footnotes, reciting relevant portions of §201(f) and §7214(a) have been omitted. The text of these statutes is noted, *infra*.

[7] Substantially identical language in §7214(a)(2) reads: "except as by law prescribed, for the performance of any duty. . . ."

intent, it matters not whether the payments were made because of economic duress, a desire to create a better working atmosphere, or appreciation for a speedy and favorable audit.

It is somewhat of a misnomer to refer to "the defense of economic coercion"; rather it (economic coercion) is related to the ultimate fact conclusion of intent. The trial court did not "rule out" such coercion as Barash argues. [1831]

Specifically, the trial court told the jury that it could consider Barash's version of Clyne's coersive approach as "pressure" and that it might "consider" the conduct of Clyne as bearing on the issue whether the defendant in making such payment or payments had the intent to influence official action, which is an essential element of the offense under old Section 201 and present Section 201-B."

The trial court can scarcely be held in error for following our opinion in which he said that the offenses specified in 18 U.S.C. §201(f) and 26 U.S.C. §7214(a) "have no requirement of specific intent." The court was entitled to accept our "view that as to these offenses economic pressure is irrelevant." 365 F. 2d 402. The charge instructed that the receipt (by Clyne and DeSibio) of compensation or reward must have been with "criminal intent" and that Barash to have aided and abetted must have "associated himself with the criminal venture, that he participated in it as something he wished to bring about, that he, by his act or acts, endeavored to make it successful."

Appellate courts will never know how much or how little a jury is able to absorb from the reading of stilted indictments and adverbial statutes, from the specification of a series of essential elements necessary to convict and the "boilerplate" forced upon trial judges by time-honored

and cumulative decisions. Refuge must be sought in trying to appraise the charge as a whole and to decide whether the jury would have been able to place the template of essential elements upon the factual mat laid out before it and thus determine a violation of the law. Such an approach leads to the belief that, if the jury had wished to accept Barash's version that he was the innocent victim of Clyne's economic pressure, the charge ade-
[1832]
quately gave it this choice as to the counts where it could have been a factor in reaching their determination.

Entrapment by Coady

Barash next contends that the trial court erroneously failed to instruct the jury on the issue of entrapment in connection with his payment of $50 to undercover agent Coady. The fact that Barash made no offer or promise to pay Coady with respect to the audit, coupled with Coady's hints that he was about to go into the armed forces and was in debt establish, it is averred, inducement sufficient to support a charge of entrapment. But the most Barash could testify to was that Coady suggested a general financial need several days before the $50 was given. There was no evidence given sufficient to warrant a jury finding that Coady induced or initiated the crime, a finding necessary to satisfy the first element of entrapment. *United States* v. *Dehar*, 388 F. 2d 430, 432-433 (2d Cir. 1968). In fact, Barash's own testimony completely refutes even any inference of attempted entrapment by Coady. Furthermore, Coady's conversations and behavior fall short even of constituting solicitation, which in itself is insufficient to constitute entrapment. *United States* v. *Berry*, 362 F. 2d 756, 758 (2d Cir. 1966). Therefore, there was no error in the court's failure to charge as to entrapment.

Testimony of Lupesco

Jeanne Lupesco, a former Revenue Service auditor, testified that Barash approached her in 1963 and inquired whether she "knew" anybody in a certain group to which Barash had been assigned for an audit. She responded by introducing Barash to Coady. In order to demonstrate what Barash meant by this question, and why Coady was [1833]
selected, the Government asked her about her prior dealings with Barash. She answered that in 1958 Barash had given her $80 in return for a favorable audit. Barash contends that the admission of this testimony constituted reversible error, primarily because the Lupesco transaction was too remote from the 1963 transactions and thus had little probative value. Even though the jury was instructed that the Lupesco testimony was to be admitted as a prior similar act solely as to the Coady transactions, and even though he was not convicted on the Coady bribery count (16), Barash argues that prejudice arose because the testimony "was quite similar to DeSibio's" and may well have influenced the jury's verdict as to the count (20) on which he was convicted. But the evidence was probative on Barash's state of mind, by helping to explain the prior relationship between himself and Miss Lupesco and the meaning of his conversation with her. To be admitted such evidence "'does not need to have strong, full, superlative, probative value, does not need to involve demonstration or to produce persuasion by its sole and intrinsic force, but merely to be worth consideration by the jury.' 1 Wigmore, *Evidence* (3d ed. 1940), 411." *United States* v. *Kahaner*, 317 F. 2d 459, 471 (2d Cir.), *cert. denied*, 375 U. S. 836 (1963). Since the Lupesco testimony was properly admitted as to the Coady count (16), and since Judge Wyatt specifically limited the jury's

consideration of this evidence to that count (which was eventually dismissed), the possible prejudice to Barash was minimal, and insufficient to establish grounds for reversal.

Failure of Proof on DeSibio counts

Barash urges that the testimony offered was insufficient to justify a jury conviction on the counts involving DeSibio. In support of this position he cites DeSibio's [1834]
lack of certainty of the exact amount of the payments made to him or of the exact words used by Barash in suggesting improper payments, and confusing jury instructions. On appeal the evidence must be viewed most favorably to the Government. *United States* v. *Aiken*, 373 F. 2d 294, 296 (2d Cir.), *cert. denied*, 389 U. S. 833 (1967). DeSibio testified that Barash had told him in words or substance, that "there would be something in it for him" if certain deductions were fraudulently allowed in 1961, and that he would not have prepared the same audit report if he had not believed that payment from Barash was forthcoming. Similar testimony was given as to a later transaction. This evidence satisfied the requisite elements of the bribery statute here and *a fortiori*, the less demanding standard of 26 U.S.C. 7214(a)(2). Neither do we find merit in Barash's assertion that the trial judge confused the jury by giving a specific answer to a specific question about a portion of the charge rather than repeating the instructions verbatim.

The Verdict

After more than 13 hours of deliberation over a two-day period, the jury sent a statement to the trial judge that it was unable to reach a verdict on some of the

counts. At that point of time, the court accepted the verdict of guilty on those counts as to which the jury had reached a conclusion[8] and in a supplemental charge asked the jury to deliberate further as to the remaining counts.[9] [1835]

Following an additional three hours of deliberation, the jury announced as to the remaining counts that it had reached a verdict on some counts but could not agree on the others.[10] Barash maintains that the trial court erred in giving what he characterizes as an *Allen* charge because it was coercive in and of itself, and in the context in which it was given. We disagree. The lower court's charge "made it sufficiently clear that a juror ought not abandon his personal conviction." *United States* v. *Bilotti*,

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[8] Counts 21, 22, 23, 24, 25, 26, 28, 30, 31, 32.

[9] The text of the charge is as follows:

> As I took pains to emphasize to the jurors in my instructions on yesterday, you should never surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict. But it is your duty as pointed out yesterday, and I point it out today, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment.
>
> Each of you must decide these counts for yourselves but you should do so only after consideration of the evidence in the case with other jurors.
>
> In the course of your deliberations you should not hesitate to re-examine your own views and change your opinion if you find that opinion to be erroneous.

[10] Barash was found guilty on counts 8, 10, 18 and 20, not guilty on counts 1, 3 and 9, while no conclusion was agreed upon on counts 2, 4, 5, 6, 11, 12 and 14.

380 F. 2d 649, 654 (2d Cir.), *cert. denied,* 389 U. S. 944 (1967). Furthermore, in veiw of the fact that more than three hours elapsed between the time of the charge and jury's final verdict, the jury had ample time for thoughtful consideration which would negate coercion. *United States* v. *Furlong,* 194 F. 2d 1, 4 (7th Cir.), *cert. denied* 343 U. S. 950 (1952); *United States* v. *Rao,* 394 F. 2d 354, 356 (2d Cir. 1968). Similarly, the claim that the supplemental charge was given prematurely has no merit. The jury here retired to deliberate at 11:25 a.m. and emerged at 11:30 p.m. to announce that it was unable to reach a unanimous decision on a number of counts. The court permitted the jury to go home to sleep. The next [1836]
day the jury deliberated for two more hours before the court gave its supplemental charge. We think the trial court acted well within its proper discretion in so timing the charge.[11]

Barash further attacks the verdict on the grounds that the trial judge improperly sent the jury back for further deliberations after accepting their verdict of guilty on a number of the counts. But no authority has been offered in support of this proposition. The cases cited by Barash hold that silence by the jury as to its verdict on particular

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[11] The minimum limits as to prematurity in this court appear to have been established in *United States* v. *Kenner,* 354 F. 2d 780 (2d Cir. 1965), *cert. denied,* 383 U. S. 958 (1966), in which an *Allen* charge was given after the jury had deliberated for three hours and 45 minutes on seven counts of unlawful payments. That case was saved from reversal by the "barest margin," that margin provided by the trial judge's disclaimer of intention to "coerce" and by his expression of willingness to accept "the ultimate decision," whatever it might be. *Id.* at 784.

counts in a multi-count indictment operates as an acquittal if the verdict is accepted by the trial judge and the jury is discharged.[12] This rule is designed to protect a defendant agianst double jeopardy in cases of retrial on the counts as to which the jury had been silent, and is inapplicable to the present situation. The practice of sending the jury back for further deliberations on unresolved counts has been followed in this circuit since *United States* v. *Cotter*, 60 F. 2d 689, 690-691 (2d Cir.), *cert. denied*, 287 U. S. 666 (1932), see also *United States* v. *Frankel*, 65 F. 2d 285, 288-289 (2d Cir.), *cert. denied*, 290 U. S. 682 (1933), and we adhere to that practice here.
[1837]

Grand Jury Proceedings

It is claimed that reversal of Barash's conviction is required because of lack of competent evidence before the grand juries which indicted him. The investigations leading to the indictments involved four grand juries and more than 40 witnesses. Clyne, DeSibio, Coady and Lupesco testified in person before one of these grand juries, giving testimony which incriminated Barash. The fact that an Internal Revenue Inspector, in the interests of economy of time, summarized this evidence before the grand jury which ultimately indicted Barash, was not improper. Though caveats had been issued against excessive use of hearsay before grand juries, its use has always been accepted, where, as here, it is "demonstrably inconvenient to summon witnesses able to testify to facts from personal

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[12] *Dealy* v. *United States*, 152 U. S. 539, 542, 14 S. Ct. 680 (1894); *Jolly* v. *United States*, 170 U. S. 402, 408, 18 S. Ct. 624 (1898); *Green* v. *United States*, 355 U. S. 184, 190-191, 78 S. Ct. 221, 2 L. Ed. 2d 167 (1957); *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 857 (2d Cir. 1965).

knowledge." *United States* v. *Umans*, 368 F. 2d 725, 730 (2d Cir. 1966), *cert. dismissed*, 389 U. S. 80 (1967); *Costello* v. *United States*, 350 U. S. 359, 363, 76 S. Ct. 311, 100 L. Ed. 406 (1955). In view of the array of grand juries involved here, and the inconvenience in recalling witnesses who had already testified from personal knowledge, the instant case is well within the *Umans* rule, *supra*. Furthermore, Barash's related contention, that there was reversible error because he was allegedly given the grand jury minutes only after Clyne left the witness stand cannot prevail—particularly since the court offered to permit Clyne's recall.

Trial Court's Charge

Barash has alleged four errors in the court's charge to the jury. It is first asserted that the court erred in failing to instruct the jury that no inference could be drawn against Barash from the testimony of Clyne and DeSibio [1838]
that they had pleaded guilty to charges of accepting unlawful payments. The trial judge had indicated that he would give the jury a compromise form of this instruction[13] but thereafter failed to do so. Barash, however, neglected to bring this omission to the court's attention and is, therefore, precluded from raising the point on appeal. Federal Rules of Criminal Procedure, Rule 30.[14]

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[13] The modified charge read:

> There was testimony by Jeremiah Clyne and Erasmo DeSibio that they had pleaded guilty to certain counts of this indictment. You must not consider that testimony or any such pleas as indicating the guilt of the defendant.

[14] The relevant portion of Rule 30 reads:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Nor do we find that the jury should have been instructed that the audit was "completed" as soon as the auditor had agreed on the amount to be disallowed, or alternatively, that a "no change" report would be filed. Such an instruction theoretically would enable the jury to infer from a payment after "completion" of the audit that the payment was not made to influence the agent's act. But in view of the considerable evidence showing many continuing responsibilities of the auditor in connection with the audit after "completion," the trial judge was correct in charging otherwise.[15]

The third alleged error in the charge is that the trial court omitted the element of intent in its instructions to the jury on the counts under §7214(a)(2). There is no [1839]
basis for this contention. After clearly indicating that a necessary element for the conviction of Clyne and DeSibio was the receipt of money "with a criminal intent, that is, with bad purpose and motive," the court instructed the jury on Barash's intent as follows:

> In order to find that the defendant aided or abetted another, in this case Clyne or DeSibio or both, to commit the offenses charged in these counts, you must find that the defendant, in some way, associated himself with the criminal venture, that he participated in it as something he wished to bring

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[15] The jury was charged as follows:

> The relevance of the making of the payment before or after the audit or audit settlement is agreed to is simply the question whether the defendant, when the payment was made, believed that there was no official action to be taken by the public official . . . .

> about, that he, by his acts or acts, endeavored to make it successful.

This language has been specifically found proper, in *United States* v. *Umans, supra,* at 728.

Finally, Barash contends that the trial judge failed properly to present his defense theory to the jury. He claims that his case was characterized as a mere denial of the testimony of the Government's witnesses, thus tending "to eliminate from consideration by the jury of [his] factual testimony of the circumstances of each audit." We have examined the record, however, and find that the factual summary was fair and accurate. Toward the beginning of his instructions, the trial judge said:

> Before considering the separate counts in the indictment I call the jury's attention to the fact that in these instructions I do not propose to review or summarize the evidence because the trial has not been so long as to make that necessary or desirable. You have heard the evidence presented and on yesterday you had the benefit of the closing arguments of counsel. If I mention any evidence in the course of these instructions it will be only for the particu-
> [1840]
> lar purpose which will be indicated. You are to attribute no significance to my failure to mention any evidence.

Following brief summaries of the testimony of Clyne and DeSibio, the trial judge told the jury that he referred to "this testimony, * * * which you heard Mr. Barash deny from the witness stand, not to indicate any opinion as to whether you should accept that estimony * * * or not but solely in order to relate the government's evidence to the

different counts and for no other purpose." Furthermore, the summary of Coady's testimony was followed by the statement to the jury that "[y]ou [the jury] heard Mr. Barash testify that he did give to Coady an envelope containing $50, but under circumstances different from those to which Coady testified, and with an intent different from that alleged in the indictment." We find no unfairness in these instructions to the jury.

Duplication of Counts

The concluding point for our consideration is Barash's contention that it was error to submit to the jury the counts under 18 U. S. C. former §201 as well as the counts under 26 U. S. C. 7214(a)(2),[16] thus permitting the jury

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[16] 26 U.S.C. §7214(a)(2) reads as follows:

> §7214. Offenses by officers and employees of the United States.
>
> (a) Unlawful acts of revenue officers or agents.—Any officer or employee of the United States acting in connection with any revenue law of the United States * * * (2) who knowingly demands other or greater than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty * * * shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

18 U.S.C. §201 reads as follows:

> §201. Offer to officer or other person.
>
> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract,

(*Footnote continued on following page*)

[1841]

to convict on both counts. In the recent decision of *United States v. Cohen*, 387 F. 2d 803 (2d Cir. 1967), we made clear the differences in the requirements for conviction under these sections:

> The aiding and abetting counts, unlike the bribery counts, require proof that the Internal Revenue Agent received a fee, not prescribed by law, for the performance of his duty. The bribery counts, unlike the aiding and abetting counts, require proof of a specific corrupt intent to influence official action. From a time standpoint alone, bribery required that money be given or promised with the intent to influence an official's decision before that decision is reached. *Id.* at 805-806.

The jury, concluded the court, might well have considered that Cohen did not possess the requisite intent for a brib-

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(*Footnote continued from preceding page*)

undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

ery conviction, but that the payments were within the reach of the milder standard of §7214(a)(2). And in fact the jury did convict Cohen only on the lesser counts, handing down acquittals on all charges of bribery. That case is therefore applicable here as to most of the counts, in [1842]
which the jury came to similar conclusions. But Barash was convicted on the jury's first partial verdict of aiding and abetting DeSibio in the receipt of payments under §7214(a)(2) (Counts 28 and 30) and a few hours later convicted on the second partial verdict of bribing DeSibio under 18 U. S. C. former §201. Thus this case squarely presents the issue absent in *Cohen*: can a jury properly convict a defendant on both of these counts?

The question was recently raised in *United States* v. *Umans, supra,* but no answer was directly supplied. In *Umans,* the defendant had been indicted and convicted under the "paired" counts of §201(b) and §201(f),[17] and un-

[17] 18 U.S.C. §201(b) reads as follows:

> §201(b). Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act; or
>
> (2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(*Footnote continued on following page*)

[1843]
der the old paired counts of former §201 and §7214(a)(2). After rejecting the defendant's claim that the pairs of statutes contained contradictory elements of proof,[18] the court found that "the correct relationship between §201(b) and §201(f) is that §201(f) is a lesser included offense

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(Footnote continued from preceding page)

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty * * * shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §201(f) reads as follows:

§201(f). Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official * * * shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[18] The court rejected defendant's claim that it was error to convict him of having committed "mutually inconsistent crimes," saying:

It appears that in both claimed inconsistent instances one of the two statutes requires proof of an extra element to convict, a specific intent to influence official action, while the other statute only requires proof that payment was made to an agent in a situation where no payment was necessary. There are not contradictory elements of required proof between the two statutes; only additional elements of proof. *United States* v. *Umans, supra,* at 728-729.

of §201(b). There is no reason to believe that Congress intended that there should be concurrent convictions and sentences under both sections, and we should not allow multiple convictions based on the same transactions even where the sentences are concurrent." *Id.* at 730. The sentences on the §201(f) counts were therefore vacated, with the court noting that there would be no effect upon the defendant's prison term since the vacated sentences were concurrent with those which remained in force. The court said nothing, however, on the question of whether such reasoning should apply with equal force to the 7214 (a)(2) convictions and sentences, each of which had a former §201 counterpart, even though both "pairs" of counts had been treated equally in previous portions of the opinion.

Because of the concurrent jail sentences on all counts of which he was convicted, this point would be without practical effect on Barash except for the aggregate amount of the fines and his argument that the Supreme Court's decision in *Milanovich* v. *United States*, 365 U. S. 551. [1844]
(1961) requires reversal of the conviction on all counts rather than merley vacating the sentences on counts claimed to be duplicitous. Quite understandably, Barash does not desire to serve any jail term under any count. The jury, however, having seen and heard Barash and the guilty-pleading agents apparently rejected Barash's version of being pressurized, of making Christmas gifts and tangibly showing monetary sympathy for Coady's financial plight. Therfore, condemned by his peers, Barash searches for technicalities in that most fertile field, the statutes themselves.

It is fair to assume that each statute was intended to have a purpose. In Congressional zeal to cover every

situation, an appearance of duplicitiousness often may be created. Specifically Barash was indicted in substance for bribery. The first twelve counts (transactions up to January 21, 1963) being under 18 U.S.C. §201 and counts 13-16 (subsequent to January 21, 1963) under §201(b). Simply stated these sections deal with the corrupt giving of money to a government employee with intent to influence him to commit a fraud on the United States. Another statute, 26 U.S.C.§7214(a)(2) prohibits employees from receiving a reward for the performance of their duties. Thus the giver and receiver are enjoined. In addition, however, the Congress wished to discourage the tempter who by his acts (aiding and abetting) would seek to break down the moral fibre of some not-too-resisting government employees. Thus Barash, as the tempter, quite apart from the direct bribe, would have been the cause of the commision of an entirely different crime by the employee, albeit the same money in both cases.

The jury was highly selective. Affirmative bribery was found as to DeSibio (counts 8 and 10). There were ac-
[1845]
quittals as to the Clyne transactions (counts 1, 3 and 9). For Barash's aiding and abetting Clyne and DeSibio to commit the crime of receiving, the jury returned guilty verdicts as to all the §7214(a)(2) counts (counts 21-32).

The jury must have been satisfied of aiding and abetting guilt much earlier in their deliberations than on the bribery counts because, pursuant to the court's advice with respect to agreement on any count or counts, they reported during the morning of their second day that they had agreed on a guilty verdict as to the aiding and abetting counts (counts 21-26, 28-32). After further deliberation, guilty verdicts on bribery were returned (counts 8, 10, 18 and 20). [Corrected on reargument, infra]

From this result, Barash argues that the court should have charged the jury that it could not return a verdict of guilty on the bribery counts *and* the gratuity counts and "at the very least" he "was entitled to an order compelling the Government to elect to proceed on either the 201 counts or the 7214(a)(2) counts."

Decisions relating to lesser included offenses are not applicable because such a situation is not presented here. The elements of the two offenses proscribed in the bribery and gratuity statutes were by no means identical. Furthermore, this court has held that a "claim, that a payor to an internal revenue officer cannot be an aider and abettor of the latter's violation of 26 U.S.C. §7214(a), is foreclosed by *United States* v. *Kenner,* 354 F. 2d 780, 785 (2d Cir. 1965), *cert. denied,* 383 U. S. 958, 86 S. Ct. 1223, 16 L. Ed. 2d 301 (1966)." 365 F. 2d at 399 n. 3. The effect of *Kenner* was thus considered in the previous Barash appeal insofar as the Government's right to proceed under both statutes is concerned. Although Kenner had been acquitted on the bribery counts and convicted [1846]
of aiding and abetting on the gratuity counts, there is no such inconsistency in the counts here as to require a different result. See also *United States* v. *Cohen,* 387 F. 2d 803 (2d Cir. 1967).

FRIENDLY, *Circuit Judge,* concurring (with whom FEINBERG, *Circuit Judge,* also concurs):

If the issue were *res nova,* I would have considerable difficulty in believing that an accountant who makes a payment to an internal revenue agent can properly be convicted for aiding and abetting the agent in violation of 26 U.S.C. §7214(a)(2). The ALI Model Penal Code, which uses the term "accomplice" to encompass aiding and abetting, §2.06(3), says in §2.06(6):

"Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(b) the offense is so defined that his conduct is inevitably incident to its commission; . . ."

This principle would seem peculiarly applicable when the legislature has enacted other provisions, here 18 U.S.C. §201, specifically directed against the payor, even though Congress decided in 1963 that these were not broad enough.

However, this court crossed that bridge in *United* v. *Kenner,* 354 F. 2d 780, 785 (2 Cir. 1965), cert. denied, 383 U.S. 958 (1966), the applicability of which we assumed on Barash's earlier appeal, 365 F. 2d at 399 n. 3, see also *United States* v. *Cohen,* 387 F. 2d 803 (2 Cir. 1967). I understand that the Government now "pairs" with §201(b) only the lesser included offenses of §201(f), [1847]
and Barash was convicted on two counts under old §201 which would have amply supported the nine months imprisonment that he must serve. I am also not entirely persuaded that even if Barash could permissibly be held guilty as an aider or abettor of the agent's violations of 26 U.S.C. §7214(a)(2), he could be convicted both of that and of a violation of §201, see *Milanovich* v. *United States,* 365 U.S. 551 (1961), as he was on counts 8 and 28, and 10 and 30, but that also seems to be assumed by our previous decisions. Under the circumstances I do not feel warranted in seeking reconsideration of the issue by the full court.

In all other respects I agree with Judge MOORE's careful opinion.

Opinion of United States District Court

UNITED STATES OF AMERICA

v.

DAVID BERNARD BARASH, Defendant.

No. 65 CR. 243.

United States District Court

S. D. New York

Dec. 7, 1966.

266 F. Supp. 126

BRYAN, District Judge:

Defendant Barash, an accountant and lawyer, was originally convicted on 26 counts of a 32 count indictment charging various violations of law with respect to payments to internal revenue agents in connection with their office audit examinations of income tax returns of his clients. The Court of Appeals unanimously reversed the conviction for a variety of errors committed at the trial and remanded for a new trial. United States v. Barash, 365 F. 2d 395 (2 Cir. 1966).

Barash now moves (1) to dismiss either Counts 1-6, 8-12, 14 and 16, charging violations of 18 U.S.C. §§ 201 and 201(b),[1] or Counts 16, 21-26 and 28-32, charging violations

[1] Present § 201(b), enacted by 76 Stat. 1119 (1962), was simply a rewording of former § 201.

of 18 U.S.C. §§ 2, 201(b) and 26 U.S.C. § 7214(a) (2), or, in the alternative, to require the United States to elect betwen the two groups of counts; and (2) to sever Counts 16 and 20.

COUNTS 1-6, 8-12, 14 and COUNTS 21-26, 28-32,

Barash's primary claim is that he may not be tried simultaneously on Counts 1-6, 8-12 and 14, on the one hand, and Counts 21-26 and 28-32, on the other. Counts 1-6, 8-12 and 14 charge violations of 18 U.S.C. § 201 (or 201(b) depending upon the time of the alleged offense) and allege in substance that Barash knowingly gave money to Internal Revenue employees "with intent to influence their decisions and actions on questions * * * then pending * * * before them in their official capacities."[2] These counts will be referred to as the bribery counts.

Counts 21-26 and 28-32, which relate to the same payments referred to in the bribery counts, charge that Barash aided and abetted the same Internal Revenue employees in receiving illegal fees for the performance of their dutis in violation of 18 U.S.C. §2, and 26 U.S.C. § 7214(a) (2).[3] These counts will be referred to as the aiding and abetting counts.

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[2] The allegations of Count 14 differ somewhat from the others, but not materially.

[3] This section provides:

"(a) Unlawful acts of revenue officers or agents.—Any officer or employee of the United States acting in connection with any revenue law of the United States * * *

"(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty" is guilty of an offense against the United States.

Barash claims in essence that under Milanovich v. United States, 365 U.S. 551, 81 S. Ct. 728, 5 L. Ed. 2d 773 (1961) and Heflin v. United States, 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959), the Government cannot proceed against him on both the bribery counts and the aiding and abetting counts. Barash maintains that he has been "charged in one indictment with the crime of bribing Internal Revenue Agents and in separate counts with the crime of receiving those bribes from himself."[4] Under these circumstances, it is said, Congress could not have intended to "pyramid penalties" for essentially the same criminal acts. 358 U.S. at 419, 79 S. Ct. 451.

[1] On the merits Barash's claims appear to be foreclosed by recent decisions of the Court of Appeals of this Circuit. It is settled that a payor of a bribe can be charged and convicted of aiding and abetting violations of 26 U.S.C. § 7214(a) (2). United States v. Kenner, 354 F. 2d 780 (2 Cir. 1965), cert. den., 383 U.S. 958, 86 S. Ct. 1223, 16 L. Ed. 2d 301 (1966). Furthermore, in United States v. Umans, 368 F. 2d 725 (2 Cir. 1966), cert. granted, 386 U.S. 940, 87 S. Ct. 975, 17 L. Ed. 2d 872 (1967), the Court of Appeals affirmed a conviction of the payor of a bribe to Internal Revenue employees both for bribery as a principal under 18 U.S.C. § 7214(a) (2). As appears from the indictment, the same nine illegal payments formed the basis for nine bribery counts and nine aiding and abetting counts. Though the Court in *Umans* did not specifically refer to *Milanovich,* it reversed convictions on three other counts charging violations of 18 U.S.C. § 201 (f)—making it a crime to pay a public official "for or be-

[4] Defendant's Memorandum of Law, p. 3.

cause of any official act"[5]—because defendant had also been convicted on three § 201(b) bribery counts for the same criminal acts. Reversal was thought to be necessary on these counts because:

> "the correct relationship between § 201 (b) and § 201 (f) is that § 201(f) is a lesser included offense of § 201(b). There is no reason to believe that Congress intended thatt here should be concurrent convictoins and sentences under both sections, and we should not allow multiple convictions based on the same transactions even where the sentences are concurrent. The sentences on the § 201(f) counts are therefore vacated." 368 F. 2d at 730.

However, since the court affirmed the convictions on the other counts evidently it was of the view that the defendant could be tried simultaneously for the same criminal acts for bribery under § 201 and for aiding and abbetting under §7214 (a) (2). Contrast Model Penal Code §1.07 (Proposed Official Draft, 1962).

[2] But it is unnecessary finally to resolve that question on this motion. Even assuming that Barash's contentions have merit, they cannot be disposed of by motion to dis-

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[5] "(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official. * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

miss. In *Milanovich* the Supreme Court held that a defendant could not be convicted of both stealing and receiving the same goods he has stolen. However, the Court did not require dismissal of one of the counts or election between them prior to trial. It held, rather, "that the trial judge erred in not charging that the jury could convict of either larceny or receiving, but not of both." 365 U.S. at 555, 81 S.Ct. at 730.

The present case should preceed in similar fashion. After the evidence is in the trial judge will be in a position to give appropriate instructions to the jury concerning the verdict to be rendered with respect to the bribery counts or the aiding or abbetting counts or both. Conceivably, since the bribery counts require proof of an additional element, i. e., a specific intent to influence official action, see United States v. Umans, supra, the evidence may be insufficient to sustain simulatenous convictions on both counts in any event. However the facts may develop, decision must await trial.

Count 16

[3] Barash bases his motion to dismiss Count 16 on a dictum in the opinion of the Court of Appeals in this case to the effect that "it is questionable" whether the Government made out enough to go to the jury" on this count. 365 F.2d at 399. However questionable the proof may have been, there is nothing to prevent the Government from correcting any deficiencies upon re-trial if it can. Unlike Merrit v. United States, 334 F.2d 359 (5 Cir. 1959) (per curiam), relied upon by defendant, the Court of Appeals did not squarely hold that the proof on Count 16 was insufficient as a matter of law. Obviously this court

cannot go further on remand and direct a dismissal of the count before trial on the ground that at the last trial the Government's case was said to be "questionable" in some respects.

Severance of Counts 16 and 20

[4] In order to prevail on a motion to sever a defendant must demonstrate that he "is prejudiced by a joinder of offenses." Rule 14, F.R.Cr.Pro. The Government strenuously urges that Barash has waived any objection by failing to raise it at the first trial. See Rule 12(b) (2), F.R.Cr.P. But it is unnecessary to decide whether defendant has waived, or if so, may be relieved from his waiver on this motion, for he has not made a sufficient showing of prejudice to justify a severance at this time.

[5] Barash claims that Counts 16 and 20 stand in a unique position because they "involve an alleged payment to Coady, who, unlike the other two office auditors who by their testimony and pleas of guilty in many cases have admitted their corruption, was an undercover agent working for the Inspection Service, hence supposedly incorruptible, hence supposedly truthful."[6] He also urges that his defense to Counts 16 and 20 is likewise somewhat unique, though he fails to demonstrate in what respects this is so.

[6] For purposes of this motion it is sufficient to say that these contentions fall far short of demonstrating a likelihood of "any confusion or injustice arising from the joint rial." Opper v. United States, 348 U.S. 84, 95, 75 S.Ct. 158, 99 L.Ed. 101 (1954). Of course, the trial

[6] Defendant's Memorandum of Law, p. 16.

judge is under "a continuing duty at all stages of the trial to grant a severance if prejudiced" to a defendant becomes evident. Schaffer v. United States, 362 U.S. 511, 516, 80 S. Ct. 945, 948, 4 L.Ed.2d 921 (1960); see United States v. Kelly, 349 F.2d 720, 759 (2 Cir. 1965). Thus Barash's rights can be fully protected as the evidence unfolds at the trial. The motion to sever, like the moion to dismiss, is premature.

Both motions are denied without prejudiced to renewal at the trial.

It is so ordered.

Opinion of United States Court of Appeals

UNITED STATES of America,
Appellee,

v.

David Bernard BARASH, Appellant.

No. 459, Docket 30402.

United States Court of Appeals

Second Circuit.

Argued June 24, 1966.

Decided Aug. 3, 1966.

365 F. 2d 395 (1966)

FRIENDLY, Circuit Judge:

A grand jury in the District Court for the Southern District of New York returned a rather confusing 32 count indictment against David Bernard Barash, a certified public accountant and attorney, relating to improper payments to internal revenue agents in connection with their office audit examinations of income tax returns of Barash's clients. Counts 1-12 charged him with giving money to Agents Clyne, Montello and DeSibio in 1960, 1961, 1962 and on January 18, 1963, with intent to influence their official acts in violation of 18 U.S.C. § 201, and counts 13-16 charged him with gifts to Agents Clyne, Montello, Wolf and an agent subsequently identified as

Coady for a similar purpose later in 1963 in violation of 18 U.S.C. § 201 (b) as the statute now stands.[1] Counts 17-20 charged him with making the same gifts alleged in counts 13-16 for and because of the agents' official duties, in violation of 18 U.S.C. § 201(f), added in the amendment of October 23, 1962, which became effective 90 days after passage. Finally counts 21-32, which related to the same payments alleged in counts 1-12, charged him with aiding and abetting Clyne, Montello and DeSibio in receiving illegal fees for the performance of their duties in violation of 26 U.S.C. § 7214(a) (2). After trial before Judge MacMahon and a jury, Barash was acquitted on the six counts relating to Montello and Wolf but found guilty on the twenty-six (involving thirteen transactions) which concerned Clyne, DeSibio and Coady. He was sentenced to imprisonment of a year and a day on each count, the sentences to run concurrently.

The Government's case was presented through the agents. Clyne and DeSibio had pleaded guilty to offenses charged in the instant indictment and to others; Coady had been operating in an undercover capacity. Clyne, who was the receiving party in ten of the thirteen incidents resulting in convictions, testified to a pattern of conduct substantially as follows: Barash would inform Clyne of clients who had received "call-in" letters instructing them to appear for audit of their returns before the group of agents that included Clyne. In violation of office procedures Clyne would obtain the returns and related papers from his supervisor's file and assign the audits to him-

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[1] So far as concerns the offense of bribery, the amendment effected by 76 Stat. 1119 (1962) was only a rewording and made no change of substance.

self. Barash would suggest relatively small disallowances in unsubstantiated deductions for travel and entertainment expenses, and would offer Clyne compensation for thus passing the returns. When Clyne obliged, Barash would make payments rangingfrom $20 to $50 per return. DeSibio, who figured in two incidents in 1961, gave similar testimony except that he did not say Barash had taken the initiative in getting the audits assigned to him. Coady testified that in July 1963 Barash, after being introduced to him by a fellow-employee, Jeanne Lupescu, asked if Coady could get a tax return from the files and assign it to himself; when Coady answered in the affirmative, Barash furnished him the details, requested a "no-change" report the next day and, on Coady's assent, said he had an envelope for him and shortly returned with one containing $50.

The theory of the defense was that Clyne and DeSibio had implicated Barash in order to get favorable consideration as to their sentences for other crimes, and that Coady had distorted an incident that was wholly innocent. Barash denied offering anything to the agents in connection with the audits, although he admitted having given Christmas presents of $25 or $50 to Clyne in 1960, 1961 and 1962 and making a $50 payment in January 1963, having DeSibio to lunch, and having made a $50 gift to Coady in appreciation of the latter's expediting the audit and in response to a remark, admittedly made by Coady, that he was soon going off to Marine Corps summer camp. Barash also testified as to pressure from Clyne, beginning with a mild suggestion on an audit in the spring of 1961 and mounting in intensity thereafter,[2] all

[2] Specifically Barash testified that in November 1961, on the audit of the returns mentioned in counts 11 and 31, Clyne refused to look at his substantion, saying that unless he were paid from $100 to $200 per audit, Barash would never get a case approved in Clyne's group and Clyne would "louse" him up in other groups; and in the summer of 1962, Clyne said, "You cut your throat in this particular group, and as far as I am concerned, you may have cut it in other groups."

of which Clyne had denied on cross-examination, and was again to deny on rebuttal.

[1, 2] Barash raises many claims of trial error;[3] the Government defends the judge's rulings and instructions and argues in the alternative that any error can be quarantined to particular counts and is immaterial in view of the concurrent sentences. See Lawn v. United States, 355 U.S. 339, 359, 362, 78 S.Ct. 311, 2 L.Ed. 2d 321 (1958). However, as Judge Clark made clear for us, the doctrine of the one good count is not a fetish; we must inquire whether "the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." United States v. Hines, 256 F.2d 561, 563 (2 Cir. 1958).

[3-5] We begin with the two counts relating to Coady, the single agent whose slate was clean and whose testimony may thus have carried particular weight. Cross-examination had emphasized that Barash had given him

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[3] An additional claim, that a payor to an internal revenue officer cannot be an aider and abettor of the latter's violation of 26 U.S.C. § 7214(a), is foreclosed by United States v. Kenner, 354 F. 2d 780, 785 (2 Cir. 1965), cert. denied, 383 U. S. 958, 86 S. Ct. 1223, 16 L. Ed. 2d 301 (1966). On its facts the Kenner decision would also rule out a claim that the Government may not proceed against a payor both as a principal under 18 U.S.C. § 201 and as an aider and abettor of a violation of 26 U.S.C. § 7214(a). The point, however, was not raised or discussed in Kenner, and has likewise not been raised in this case. We thus have no occasion to consider whether Milanovich v. United States, 365 U. S. 551, 81 S. Ct. 728, 5 L. Ed. 2d 773 (1961), is applicable to offenses such as those here at issue.

$50 only after the audit had been concluded and therefore could not have intended the payment to influence any action on his part. The Government sought to counter this by asking Coady on redirect whether prior acts had led him to believe he would be paid. He mentioned three —the suggestion that he pull the return and assign it to himself, the request for a no-change without substantiation, and, over objection, the introduction of Barash to him by Jeanne Lupescu "because Miss Lupescu had never introduced me to anyone except someone who was going to pay me off." Granted that a promise to pay can be conveyed only by a wink of the eye, it is questionable whether even if all this evidence were properly received, the Government made out enough to go to the jury on the bribery count with respect to Coady. But the testimony as to Lupescu should not have been admitted. Its hearsay nature, which would have been obvious if Coady had said Lupescu had told him that Barash had previously paid her or other agents and thus was an accountant of the paying kind, was not removed because she conveyed her meaning without the use of words. The guiding principle was stated long ago by Baron Parke in thhe leading case of Wright v. Tatham, 7 Ad. & E. 313, 388-389, 112 Eng. Rep. 488, 516-17 (1837):

> "* * * proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible."

See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177, 190-192 (1948);

McCormick, Evidence § 229 (1954), and cases cited. The Government, not seriously challenging this, argues that the evidence was nevertheless admissible since, without regard to the truth of the implicit assertion, it showed that when Coady dealt with Barash, he expected to be paid. It is true enough that evidence admissible for one purpose is not rendered inadmissible "because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity," and that under such circumstances the opponent of the evidence will not prevail by interposing a general objection and is entitled only to a limiting instruction on timely request. 1 Wigmore, Evidence § 13, at 300 (3d ed. 1940); Malatkofski v. United States, 179 F.2d 905, 914 (1 Cir. 1950); United States v. Smith, 283 F.2d 760, 764 (2 Cir. 1960), cert. denied, 365 U.S. 851, 81 S.Ct. 815, 5 L.Ed.2d 815 (1961); United States v. Mont, 306 F.2d 412, 415-416 (2 Cir.), cert. denied, 371 U.S. 935, 83 S.Ct. 310, 9 L.Ed.2d 272 (1962). But here Coady's state of mind was irrelevant unless induced by Barash, a fact as to which the Lupescu story was hearsay; it was thus inadmissible for any purpose. Since the evidence was highly material and the jury cannot realistically be supposed to have considered it only in relation to the bribery count, the convictions on both Coady counts would have to be reversed if they stood alone.[4]

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[4] We therefore need not consider defendant's further complaint as to the charge on entrapment by Coady. Although what the judge said as to burden of proof was indeed in conflict with our decisions in United States v. Sherman, 200 F. 2d 880, 882-883 (2 Cir. 1952), and United States v. Pugliese, 346 F. 2d 861, 862-863 (2 Cir. 1965), it is questionable whether there was any showing of inducement sufficient to raise the issue. Cf. United States v. Riley, 363 F. 2d 955 (2 Cir. 1966).

[6] Another error occurred in the course of cross-examination of Clyne. When defense counsel asked if he had ever threatened Barash, Clyne answered in the negative. Counsel then proceeded to cross-examine on the basis of tape recordings, furnished to him by the Government, which Coady had made of a "bull-session" at a hotel between himself, Clyne and another corrupt agent, wherein Clyne frankly revealed his practice of putting pressure on accountants to pay off. In sharp contradiction of what Clyne had just testified and in support of what Barash was later to testify, counsel developed, without objection, that Clyne boasted of having told Barash he was "getting away with murder"; that on discovering Barash was trying to have some audits done without paying off, Clyne told him he had cut his throat in Clyne's group; that he complained of how in another case Barash had beaten him out of fifty dollars,[5] and on this or another occasion Clyne had asked $150 but got only $100; and that he had compared Barash unfavorably with Eugene Kenner, see 354 F.2d 780, who "when he comes in on a case, you never have to ask him." Inexplicably a question whether Clyne remembered having told Coady "you get your money's worth with Gene Kenner; you'll get robbed * * *," triggered an objection. The judge sustained this, saying, in the presence of the jury, that he had been waiting for it all afternoon and that if the Assistant United States Attorney had objected earlier, "We might have saved an awful lot of time." Defense counsel then asked whether Clyne told Coady "about a particular case that you had where you set the taxpayer up by being very tough on the audit. * * *" At this point the judge asked counsel

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[5] "Throat" and "dollars" were preceded by an adjective that in former days would have been characterized as "unprintable."

to approach the bench, said the court had been very patient with him all afternoon, admonished that the tape could be used only for impeachment, and concluded "you are needlessly prolonging this cross-examination by going into all this stuff and you are not using it for the purpose of impeachment. Now, cut it out!"[6]

[7] Impeachment was the precise enterprise in which defense counsel had been properly engaging, and to good effect. Clyne had denied ever having any trouble with Barash, ever trying to get money from him, ever saying Barash would be subjected to delays, and ever stating that Barash had cut his own throat by failing to pay an agent in the group. Quite apart from possible relevancy on the issue of intent to bribe, Clyne's making of unsuccessful threats and his dislike of Barash were pertinent on the score of bias, and self-contradiction could properly be shown. 3 Wigmore, Evidence §§ 1021, 1022. Indeed, so far as concerns cross-examination as distinguished from extrinsic proof, impeachment as to prior inconsistent statements is proper even with respect to

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[6] When Government counsel returned to the subject on redirect and asked Clyne what he meant by saying he made a "charge" with respect to a return, the judge interrupted and "sustained" his own objection, saying "I have told both of you, and I will now charge the jury—maybe I will get it home to counsel—that even if he did charge, even if he did demand the money, that would not constitute an offense as charged unless he put the defendant in serious threat of bodily injury or death. Now, that is the law. So let us have no more of this wandering all over Robinson's barn on the business of whether he charged or whether he asked for it. That is of no moment." Defense counsel excepted. Irrespective of whether this is "the law" the judge's remarks improperly ignored and told the jury to ignore the testimony as impeachment.

"collateral" matters "which the witness has testified to on direct or cross." McCormick, Evidence § 36; 3 Wigmore, Evidence § 1023. For the defense to establish that Clyne had lied about not making threats would have an importance transcending that particular issue; the jury might well have concluded that, having lied on one subject, he had lied on all.

[8] If the judge had followed his own bent and prevented any cross-examination as to the tapes, the convictions on the twenty counts relating to Clyne would surely have to be reversed. However, due to the United States Attorney's lack of objection, defense counsel was able to get a large amount of the recordings before the jury—enough to include the point in his summation. Under such circumstances we would normally decline to entertain a claim of erroneous exclusion of evidence in the absence of an offer of proof that would enable us to determine whether the evidence was relevant and more than cumulative. See Wigmore, Evidence § 20, at 357 n. 6; F.R.Civ. P. 43(c); Price v. United States, 68 F.2d 133, 134-135 (5 Cir.), cert. denied, 292 U.S. 632, 54 S.Ct. 640, 78 L.Ed. 1486 (1934); Davis v. R. K. O. Radio Pictures, Inc., 191 F.2d 901, 903-904 (8 Cir. 1951). But we are not disposed to be thus insistent when an attorney who, while pursuing an appropriate line of cross-examination in a criminal trial, has been curtly commanded to "cut it out." Moreover, the judge's remarks on sustaining the first objection and on rebuttal, see fn. 6, in effect instructed the jury to disregard the impeaching evidence that had already been elicited.

[9-12] We also think the charge was in error, in two respects. Although the instruction that only a threat of death or serious bodily injury would make out the defense of duress appears correct enough, cf. D'Aquino v. United

States, 192 F.2d 338, 358-359 (9 Cir.), cert. denied, 343 U.S. 935, 72 S.Ct. 772, 96 L.Ed. 1343 (1951); ALI, Model Penal Code § 2.09 (Proposed Official Draft 1962), that was only part of the story since Barash had also requested instructions as to the bearing of threats of economic harm on the intent required for conviction. This court has recently observed that "The intent to influence, accompanying the corrupt giving or accepting of something of value, is an essential element" of the offense of bribery defined in 18 U.S.C. § 201(b), United States v. Irwin, 354 F.2d 192, 197 (2 Cir. 1965), cert. denied, 383 U.S. 967, 86 S.Ct. 1272, 16 L.Ed.2d 308 (1966). We think that if a government officer threatens serious economic loss unless paid for giving a citizen his due, the latter is entitled to have the jury consider this, not as a complete defense like duress but as bearing on the specific intent required for the commission of bribery.[7] Cf. United States v. Miller, 340

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[7] The statute, 18 U.S.C. § 201, provides:

> "(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official * * * with intent—
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> (1) to influence any official act; or
>
> (2) to influence such public official * * * to commit or aid in commiting, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) to induce such public official * * * to do or omit to do any act in violation of his lawful duty, * * *.
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both. * * *"

The case put would plainly not come under subdivisions (2) or (3) and a jury could conclude that a payment solely to eliminate a roadblock to what a citizen is entitled is not to "influence" any official act.

F.2d 421, 425 (4 Cir. 1965). While it is arguable that this is also true with respect to giving gratuities under 18 U.S.C. § 201(f),[8] or to being an accessory to the receipts prohibited by 26 U.S.C. § 7214(a), offenses which have no requirement of specific intent, see United States v. Irwin, supra, 354 F.2d at 197, and carry a significantly lower punishment, we incline to the view that as to these offenses economic pressure is irrelevant.

[13] The other error also relates to the bribery counts. After correctly instructing that the Government must prove "money was offered or promised or given knowingly and wilfully with a corrupt intent to influence" the employee, and that this may be proved not only by what was said by the accused "but also from his acts and conduct and the circumstances and reasonable inferences to be drawn from them," the judge went on to say:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done. So unless the contrary appears from the evidence, you may draw an inference that the defendant intended the natural consequences which one standing in his circumstances and possessing his knowledge should reasonably

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[8] "(f) Whoever, otherwise than as provided by law for the propetr discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official • • •

"Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

have expected from any of his acts which he knowingly did."[9]

He continued that if the jury found "circumstances of secrecy or intrigue or of the deviousness or of the use of cash or attempts to conceal the real nature of the acts or transactions," it might consider these as bearing on the defendant's criminal intent.

Despite its ancient vintage, see Agnew v. United States, 165 U.S. 36, 53, 17 S.Ct. 235, 41 L.Ed. 624 (1897), utterance of the quoted platitude serves no useful purpose, since insofar as the statement has logical validity the jury would know it anyhow; more important, in a bribery case it creates a serious risk that the jury might think the Government's burden of showing the required specific intent could be met by proof of payment alone "unless the contrary appears from the evidence"—presumambly evidence the defense would have to present. Many courts of appeals have looked askance on such an instruction in criminal trials, and some decisions have reversed because of its use, Bloch v. United States, 221 F.2d 786, 788-789 (9 Cir. 1955); Chappell v. United States, 270 F.2d 274, 279 (9 Cir. 1959); Mann v. United States, 319 F.2d 404, 407-410 (5 Cir. 1963), cert. denied, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964). Although others have held reversal was not required when the instruction as a whole sufficiently insured against the jury's being misled, Sherwin v. United States, 320 F.2d 137, 148-151 (9 Cir. 1963), cert. denied, 375 U.S. 964, 84 S.Ct. 481, 11 L.Ed.2d 420 (1964); Estes v. United States, 335 F.2d 609, 615-617 (5 Cir. 1964), cert. denied, 378 U.S. 964, 85

[9] Due exception to this was taken.

S.Ct. 656, 13 L.Ed.2d 559 (1965); United States v. Denton, 336 F.2d 785, 788 (6 Cir. 1964); United States v. Releford, 352 F.2d 36, 40 (6 Cir. 1965), cert. denied, 382 U.S. 984, 86 S.Ct. 562, 15 L.Ed.2d 562 (1966), we are not satisfied that was the case here. On the contrary, when this instruction was combined with the charge on duress and the judge's observation that "One of the purposes of the bribery laws is to nip corruption in the bud, and citizens are obliged in such circumstances not to go along with a crime, but to complain about it to the proper authorities," the jury could well have thought that the Government satisfied its burden under the bribery counts by proof of payment alone.

[14] It follows that the convictions on all the bribery counts, 1-6, 8-12, 14 and 16, are subject to reversal for the last mentioned error in the charge; that the convictions on the Clyne bribery counts relating to payments after threats of serious economic harm, namely 2, 11, 12 and 14, are further subject to reversal for failure to instruct that the jury could consider threats of this as bearing on specific intent to the extent indicated above; that the convictions on all the Clyne counts, namely, 1-6, 9, 11, 12, 14, 18, 21-26, 29, 31 and 32, are subject to reversal for erroneous restriction of cross-examination; and that the convictions on the Coady counts, 16 and 20, are subject to reversal for the erroneous admission of the statement concerning Lupescu. This leaves only two counts, 28 and 30, charging Barash with aiding and abetting DeSibio in the receipt of two payments of $25. We are dealing here with an attorney and certified public accountant of hitherto unblemished reputation, vouched for, among others, by the Surrogate of Westchester County, a Justice of the Supreme Court of New York, and the County Executive

of Westchester. We are far from being certain that the restriction and deprecation of the impeachment of Clyne, the chief Government witness, and the admission of the Lupescu hearsay statement in the testimony of Coady, the undercover agent, did not have a spill-over effect on the DeSibio counts; that the jury might not have exercised its prerogative of leniency if these charges alone had been before it; or that the judge would have given the same sentence for convictions on these two aiding and abetting counts as he did for those on the twenty-six, including convictions for bribery. Applying the rule of United States v. Hines, supra, 256 F.2d 561, we think our duty to "require such further proceedings to be had as may be just under the circumstances," 28 U.S.C. § 2106, demands a reversal and a remand for a new trial.[10]

Reversed.

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[10] We may as well express our views as to one matter that will probably arise on such a trial. Clyne was allowed to state, over objection, that in August 1960 Barash had arranged for him to receive ten "call-in" letters and that he obtained th returns and related papers, assigned the audits to himself, went to Barash's office for the audits and, after completing them, received $225. The objection was that since only three of these returns figure in the indictment—the Government having been unable to identify the others—the prosecution had been improperly allowed to introduce evidence of other crimes. As explained in our recent opinion in United States v. Bozza, 365 F. 2d 206, 212-214 (1966), the rule applied on this subject in the federal courts does not require any such artificial truncation of a single piece of evidence.

Judgment of the United States District Court

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 65 Cr. 243

UNITED STATES OF AMERICA,

v.

DAVID BERNARD BARASH,

On this 8th day of December, 1967, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly giving money to Internal Revenue Service employees to influence decisions and actions on questions pending before them in office audit examinations of Federal Income tax returns (Title 18, Section 201(b) U. S. Code); unlawfully, wilfully and knowingly giving money to Internal Revenue Service employees for and because of official acts performed and to be performed in office audit examinations of Federal Income Tax returns. (Title 18, Section 201(f) U. S. Code.); unlawfully wilfully and knowingly aiding, abetting, inducing and procuring the receiving of fees, compensations and rewards, not prescribed by law, by employees of the Internal Revenue Service. (Title

26, Section 7214(a)(2) U. S. Code and Title 18, Section 2, U. S. Code.) as charged in counts 8, 10, 18, 20 through 26 inclusive and 28 through 32 inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of NINE (9) MONTHS on each of counts 21 through 26 inclusive and 28 through 32 inclusive to run concurrently with each other and FINED $1,000.00 on each count.

FIVE (5) YEARS and FINED $2,500.00 on each of counts 8 and 10. TWO (2) YEARS and FINED $2,500.00 on each of counts 18 and 20. Prison sentence on counts 8, 10, 18 & 20 to run concurrently with each other. Execution of prison sentence on counts 8, 10, 18 & 20 suspended. Defendant placed on probation for FIVE (5) YEARS, to commence upon expiration of confinement imposed on counts 21 through 26 inclusive and 28 through 32 inclusive, subject to the standing probation order of this court.

The defendant is to stand committed until the fines of $11,000.00 imposed on counts 21 through 26 inclusive and 28 through 32 inclusive are paid or he is otherwise discharged according to law. The fines of $10,000.00 imposed on counts 8, 10, 18 and 20 are to be paid at such times and in such amounts as the Probation Officer shall determine.

Judgment of the United States District Court

Counts 14 and 16 are dismissed on motion of defendant's counsel.

Defendant continued on present bail. Bail pending appeal fixed in the sum of $5,000.00 unsecured bond.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

United States District Judge
INZER B. WYATT
JOHN J. OLEAR, JR.
Clerk.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of April, one thousand nine hundred and sixty-nine.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID BERNARD BARASH,

Defendant-Appellant,

JEREMIAH CLYNE, LAWRENCE [illegible]ONTELLO, ERASMO DESIBIO, and SAUL WOLF,

Defendants.

Judgment of the United States Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

32225

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID BERNARD BARASH,

Defendant-Appellant,

JEREMIAH CLYNE, LAWRENCE MONTELLO, ERASMO DESIBIO, and SAUL WOLF,

Defendants.

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

May 23, 1969

Order of the United States Court of Appeals Granting Stay, etc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID BERNARD BARASH,

Defendant-Appellant,

JEREMIAH CLYNE, LAWRENCE MONTELLO, ERASMO DESIBIO, and SAUL WOLF,

Defendants.

A petition for a rehearing and hearing *en banc* or, in the alternative, a motion to stay the issuance of the mandate having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

ORDERED, that said petition be and it hereby is denied insofar as a rehearing is sought, and granted as to the stay of the issuance of the mandate, subject to the provisions of Rule 41(b) F.R.A.P., and it is

FURTHER ORDERED, that page 1829 of the Slip Sheet opinion, footnote 5, be corrected to delete the name

Order of the United States Court of Appeals Granting Stay, etc.

"Coady" and to substitute therefor the name "Clyne"; and that page 1845 of said Slip Sheet opinion be corrected by deleting in line 8 of the first paragraph the words—

> "guilty verdicts on bribery were returned (counts 8, 10, 18 and 20)"

and by substituting therefor the following—

> "guilty verdicts on bribery, 18 U.S.C. §201, (counts 8 and 10) and payments for the performance of an official act, 18 U.S.C. §201(f) (counts 18 and 20) were returned."

LEONARD P. MOORE
HENRY J. FRIENDLY
WILFRED FEINBERG
U.S.C.J.J.

May 23, 1969

U. S. Constitution

Article [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Relevant Statutes

TITLE 18, U.S.C.

§ 2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

TITLE 18 U.S.C.

§ 201. OFFER TO OFFICER OR OTHER PERSON

Whoever promises, offers, or gives any money or thing of value or makes or tenders any check, order, contract, payment of money or for the delivery or conveyance of anything of value to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or any commitee of either House, or Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of

any fraud, on the United States, or to induce him to do or omit to any any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

This secion shall not apply to violations of section 212. itle. June 25, 1948, c. 645, 62 Sat. 691.

TITLE 18 U.S.C.

§ 201. BRIBERY OF PUBLIC OFFICIALS AND WITNESSES

(a) For the purpose of this section:

"public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicts, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty;

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, for or because of any official act performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicts, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Added Pub. L. 87-849, §1(a), Oct. 23, 1962 76 Stat. 1119.

TITLE 26 U.S.C.

§ 7214. OFFENSES BY OFFICERS AND EMPLOYEES OF THE UNITED STATES

(a) *Unlawful acts of revenue officers or agents.*—Any officer or employee of the United States acting in connection with any revenue law of the United States—

• • •

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * *

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

RULES OF CRIMINAL PROCEDURE

RULE 31. VERDICT

(a) *Return.* The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) *Several Defendants.* If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

Tabualtion of Resolution of Counts at Second Trial

[PHOTOSTAT]

(Opposite)

TABULATION OF RESOLUTION OF COUNTS AT SECOND TRIAL

Offense	Count	Auditor	Tax Return	First[1] Verdict	Second[2] Verdict	Sentence
Bribery (18 U.S.C. §201)	1	Clyne	Willette('59)	None	Acquittal	
" "	2	"	" " ('61)	"	None	
" "	3	"	Luciani ('59)	"	Acquittal	
" "	4	"	Cohen ('59)	"	None	
" "	5	"	" ('60)	"	"	
" "	6	"	Danzig ('60)	"	"	
" "	8	DeSibio	Sills ('60)	"	Guilty	5 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
" "	9	Clyne	Newman ('59)	"	Acquittal	
" "	10	DeSibio	Alfredo ('60)	"	Guilty	5 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
" "	11	Clyne	Friedman('60)	"	None	
" "	12	"	Huttick ('60)	"	"	
" (18 U.S.C. §201(b))	14	"	Kleppel ('61)	"	"[4]	
" "	16	Coady	Kaiser ('62)	"	"[4]	

TABULATION OF RESOLUTION OF COUNTS AT SECOND TRIAL

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" "	2	"	" ('61)	"	None	
" "	3	"	Luciani ('59)	"	Acquittal	
" "	4	"	Cohen ('59)	"	None	
" "	5	"	" ('60)	"	"	
" "	6	"	Danzig ('60)	"	"	
" "	8	DeSibio	Sills ('60)	"	Guilty	5 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
" "	9	Clyne	Newman ('59)	"	Acquittal	
" "	10	DeSibio	Alfredo ('60)	"	Guilty	5 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
" "	11	Clyne	Friedman ('60)	"	None	
" "	12	"	Huttick ('60)	"	"	
" (18 U.S.C. §201(b))	14	"	Kleppel ('61)	"	"[4]	
" "	16	Coady	Kaiser ('62)	"	"[4]	
Payment for Audit (18 U.S C. §201(f))	18	Clyne	Kleppel ('61)	None	Guilty	2 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
"	20	Coady	Kaiser ('62)	"	"	2 yrs., execution suspended; 5 yrs. probation; fine, $2,500.[3]
Aiding and Abetting Agents' illegal receipt of payments from Barash (18 U S C. §2 and 26 U S.C. §7214(a)(2)	21	Clyne	Willette ('59)	Guilty	--	9 mos. imprisonment; fine, $1,000., committed[5]
"	22	"	" ('61)	"	--	"
"	23	"	Luciani ('59)	"	--	"
"	24	"	Cohen ('59)	"	--	"
"	25	"	" ('60)	"	--	"
"	26	"	Danzig ('60)	"	--	"
"	28	DeSibio	Sills ('60)	"	--	"
"	29	Clyne	Newman ('59)	"	--	"
"	30	DeSibio	Alfredo ('60)	"	--	"
"	31	Clyne	Friedman ('60)	"	--	"
"	32	"	Huttick ('60)	"	--	"

FOOTNOTES RELATING TO TABULATION

1. The first verdict was returned by the jury, over objec-

"	"	10	DeSibio	Alfredo ('60)	"	Guilty	5 yrs., execution suspended; 5 yrs. probation; fine, $2,500.3/
"	"	11	Clyne	Friedman ('60)	"	None	
"	"	12	"	Huttick ('60)	"	"	
"	(18 U.S.C. §201(b))	14	"	Kleppel ('61)	"	"4/	
"	"	16	Coady	Kaiser ('62)	"	"4/	
Payment for Audit (18 U.S C. §201(f))		18	Clyne	Kleppel ('61)	None	Guilty	2 yrs., execution suspended; 5 yrs. probation; fine, $2,500.3/
"		20	Coady	Kaiser ('62)	"	"	2 yrs., execution suspended; 5 yrs. probation; fine, $2,500.3/
Aiding and Abetting Agents' illegal receipt of payments from Barash (18 U.S C. §2 and 26 U S.C. §7214(a)(2)		21	Clyne	Willette ('59)	Guilty	--	9 mos. imprisonment; fine, $1,000., committed5/
"		22	"	" ('61)	"	--	"
"		23	"	Luciani ('59)	"	--	"
"		24	"	Cohen ('59)	"	--	"
"		25	"	" ('60)	"	--	"
"		26	"	Danzig ('60)	"	--	"
"		28	DeSibio	Sills ('60)	"	--	"
"		29	Clyne	Newman ('59)	"	--	"
"		30	DeSibio	Alfredo ('60)	"	--	"
"		31	Clyne	Friedman ('60)	"	--	"
"		32	"	Huttick ('60)	"	--	"

FOOTNOTES RELATING TO TABULATION

1. The first verdict was returned by the jury, over objection, on the second day of deliberation after the Court's supplementary charge in response to the jury's questions but before the Allen charge. (A. 1044a-63a).

2. The second verdict was returned by the jury, over objection, later on the second day of deliberation after the Court's supplementary charge and after the Allen charge. (A. 1064a-70a).

3. Prison sentence and probation are concurrent on Counts 8, 10, 18 and 20; fines are cumulative and not concurrent with each other or any other part of the sentence on any count. (A. 27a).

4. A post-trial judgment of acquittal was entered by the Court below on Counts 14 and 16. (A. 28a).

5. Prison sentences imposed on Counts 21 through 26 and Counts 28 through 32 are concurrent; the committed fines are cumulative and not concurrent with each other or any other part of the sentence on any count.